133-570

133-573

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1522.~~ 1112

THE UNITED STATES, APPELLANT,

vs.

JOHN S. MOSBY.

Filed March 15, 1889.

No. 1420

JOHN S. MOSBY, APPELLANT,

vs.

THE UNITED STATES.

Filed Oct. 19. 1889

APPEALS FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1522.

THE UNITED STATES, APPELLANT, vs. JOHN S. MOSBY.

JOHN S. MOSBY, APPELLANT, vs. THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 I.—*Petition.*—*Filed March* 5, 1887.

In the Court of Claims.

JOHN S. MOSBY, *vs.* THE UNITED STATES. } No. 15586.

The petition of John S. Mosby respectfully shows that he is a citizen of the United States, and of the State of California, and a resident of the city of San Francisco, which is his post-office address.

I.

That he was consul for the United States at Hong-Kong from February 4th, 1879, until July 21st, 1885.

II.

That during his term of service he collected in fees and erroneously credited to the Treasury the following sums of money, which by law were the perquisites of the consul, viz: For examining Chinese emigrants departing on foreign vessels to the United States, $5,016.00; for certifying extra copies or quadruplicate invoices, about $2,000.00; for certifying invoices for goods in transit through the United States to other countries, $5,805.00; for notarial and clerical work, $644.01; for services to foreign-built
2 vessels carrying the American flag, about $500.00; for certifying invoices for goods exported to the United States, which were on the free list, and for which no invoice was required by law as a condition of entry, about $15,000.

III.

Your petitioner further says that these fees were voluntarily paid to him by persons at whose request the services were performed and turned by him into the Treasury because he did not wish to involve himself in a controversy with the State Department as long as he held a subordinate position in it, and was compelled to obey its orders or be dismissed from office and subjected to the imputation of appropriating money that did not belong to him. He credited the fees to the Treasury, relying on the good faith of the Government to restore whatever belonged to him on a final settlement of his accounts.

IV.

Your petitioner further says that the First Comptroller of the Treasury has refused to refund or credit him by the fees erroneously paid by him into the Treasury, assigning as the principal reason that the Treasury was in possession of them, although admitting that the larger portion of them originally belonged to him.

V.

Your petitioner prays that the facts relating to his claim may be investigated by this honorable court, and that judgment be given in his favor against the United States for the amount that may be found due to him.

3 VI.

Your petitioner further avers that he is the sole owner of the claims herein set forth; that no assignment of any interest in them has been made, and that he is justly entitled to the relief herein claimed, and that the facts set forth in this petition are believed to be true.

JOHN S. MOSBY.

W. WILLOUGHBY,
Counsel for Petitioner.

Subscribed and sworn to before me this 5th day of March, 1887.
[SEAL OF COURT.] JOHN RANDOLPH,
Asst. Clk. C. C.

Filed March 7th, 1887.

4 II.—*General traverse.*—*Filed April* 2, 1887.

And now comes the Attorney-General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

5 III.—*Amended petition.*—*Filed Feb'y* 21, 1888.

And now comes the claimant, by his counsel, and moves the court to allow an amendment to his petition by substituting instead of $5,016.00 in his claim for examination of Chinese emigrants on foreign vessels the sum of $5,147.00 as the amount claimed; and by substituting in the claim for services to foreign-built vessels carrying the American flag, instead of $500.00 the sum of $584.00.

JOHN S. MOSBY,
By W. WILLOUGHBY,
Counsel.

6 IV.—*Findings of fact and conclusions of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court upon the evidence finds the facts as follows:

I.

The claimant was consul of the United States at Hong-Kong from February, 1879, until July, 1885, and remained at his post until the latter date, when he returned to the United States.

II.

During his term he turned into the Treasury the sum of $5,147.00 on account of fees collected for examining Chinese emigrants going to the United States on foreign vessels; of this sum $3,923.50 were collected prior to September 1, 1881; and $1,223.50 were collected between September 1 and December 31, 1881.

Said fees were voluntarily paid by the masters and charterers of said vessels at whose solicitation the service was rendered, and were collected in good faith by the consul.

III.

Soon after assuming charge of the consulate, to wit, February 21 and March 19, 1879, claimant informed the Department of State that since the enactment of the law of February 19, 1862, prohibiting the coolie trade in which American vessels had been engaged, it had been the practice at Hong-Kong to procure for American and foreign vessels carrying Chinese passengers to the United States a consular certificate of the fact that they were free and voluntary emigrants.

The claimant addressed said communications to the State Department to establish that the fees belonged to him, but paid into the Treasury before receiving a reply the sum of $731.75.

In reply to a claim that he, the consul, was entitled to such fees, the Secretary of State replied, in substance, that the fee is an official fee, and must be accounted for to the Treasury.

IV.

He gave written advice to the agent of the O. & O. S. S. Co., at Hong-Kong, to send steam-ships which were under the English flag, without a consular certificate, for the Chinese emigrants, as no law required it, and the agent declined to do so.

7 A copy of his letter to the said agent was forwarded to the State Department. It does not appear that the Department replied to his communication accompanying said letter.

V.

The Bothwell Castle, an English steam-ship, sailed from Hong-Kong about January 6, 1882, carrying Chinese emigrants without the usual consular certificate of examination, but with a letter from the United States

consul addressed to the collector at San Francisco, explaining why the master did not have it.

Said vessel entered the port of San Francisco without trouble about February 1, 1882; all other foreign vessels after that time ceased to procure the said consular certificate.

A copy of said letter to the collector at San Francisco was forwarded to State Department; but claimant did not receive a reply.

All emigration fees collected up to December 31, 1881, were turned into the Treasury.

VI.

The sum of $633.25 was collected in January, 1882, for examination of Chinese on foreign vessels, which was first credited and then charged back to the Treasury; and a letter was written by the claimant to the First Comptroller explaining that item in his accounts. The Comptroller allowed the item as a proper charge.

VII.

The charterers of foreign vessels who had paid these fees to the consul afterwards applied to the Treasury to have them refunded, which was refused by the Comptroller on the ground "that the collection of said fees was proper and they should not be refunded."

VIII.

The claimant, after his removal from office, claimed the emigration fees from foreign vessels. His claim was also disallowed.

The fees collected subsequent to January 3, 1882, were refunded by the consul to the parties who paid them.

The consul was not charged with the fees so refunded, or those he might have collected, if he had not declined to continue the practice of examining Chinese emigrants on foreign vessels. The claimant refused to collect fees after receiving from the State Department notice that such fees must thereafter be accounted for as official fees. Said notice, in the form of a letter from the Department, was dated on said date, and reached claimant in due course of mail.

IX.

The claimant paid into the Treasury the sum of $5,805 on account of fees received by him for certificates of shipment of merchandise in transit through the United States to other countries.

8 X.

The claimant paid into the Treasury the sum of $1,592 for certifying extra copies or quadruplicate invoices of goods shipped to the United States.

The said sum was collected by claimant before the 1st day of September, 1881.

XI.

He credited and paid to the Treasury $584 on account of fees collected for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag.

He credited and paid into the Treasury $2,095 on account of invoices certified by him for free goods imported into the United States.

XII.

The claimant credited and paid into the Treasury fees, aggregating $644.01, accruing as follows:

(*a*) Recording instruments at various times, between February 4, 1879, and December 31, 1880	$39.29
(*b*) Cattle-disease certificates collected in small items from time to time, between February 4, 1879, and September 30, 1880	152.00
(*c*) Interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882)	104.51
(*d*) Acknowledgments and authentications of instruments collected from time to time in small quantities, between February 4, 1879, and December 31, 1879, certifying official character and signature of notary public	48.00
(*e*) Certificates of shipments, or extra invoices, collected during the December quarter, 1881, $2.50 each	292.00
(*f*) Five per cent. commission on the estate of Alice Evans, May, 1881	8.21
	644.01

XIII.

The payment by the claimant of these several sums of money into the Treasury was for the purpose of avoiding a controversy with the Department. Soon after the claimant was removed from office, and before a final settlement of his accounts he made a demand that all fees now claimed be credited to him.

XIV.

At the request of claimant's counsel, the following facts are also found:

Said claimant wrote to the State Department, March 19, 1879, as stated in Finding III, in which communication he informed said Department that it had been the habit of his predecessors to retain said fees as unofficial, and asked to be instructed whether he, the claimant, was not entitled to same.

The said Department replied as follows:

9 "It is now deemed to be the more advisable course to prescribe the fee as an official one to be accounted for to the Treasury."

In instructions to said claimant, dated August 26, 1879, the said Department instructed claimant that the fees for acts which the consul is empowered but not required by law to perform and which relate only to private transactions are unofficial.

CONCLUSIONS OF LAW.

The court determines as conclusions of law that the claimant is entitled to recover as follows:

For examining Chinese emigrants departing on foreign vessels to the United States	$5,147.00
For certifying invoices of goods through the United States	5,805.00
For items b, d, and f, in Finding XII	208.21
For services to foreign-built vessels carrying the American flag	584.00
For certifying invoices of goods imported to the United States which were on the free list	2,095.00

WELDON, J., delivered the opinion of the court:

The claimant was consul of the United States at Hong-Kong from the 4th day of February, 1879, to the 21st of July, 1885, and during that time, as he alleges, he receceived a large amount of unofficial fees, which were paid into the Treasury of the United States; and this suit was instituted, and is now prosecuted, to recover against the defendants a judgment for said fees. The claim embraces six items:

(1) For examining Chinese emigrants departing in foreign vessels to the United States, $5,147.

(2) For certifying extra copies of quadruple invoices, $2,000.

(3) For certifying invoices of goods in transit through the United States to other countries, $5,805.

(4) For notarial and clerical work, $644.01.

(5) For services to foreign-built vessels carrying the American flag, $584.

(6) For certifying invoices for goods exported to the United States which were on the free list and for which no invoice was required by law as a condition of entry, $15,000.

In the trial of the cause several questions of law were discussed, and which become important in the decision of the controversy. It is insisted, by way of argument, against the plaintiff's rights to recover, that the statute of limitations had run, when the suit was commenced; and that therefor the petition should be dismissed. As has been said in many decisions of this court, the statute of limitations is always applicable to a proceeding within the general jurisdiction of the court; whether pleaded or not. Revised Statutes, section 1069, provides:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred, unless the petition setting forth a statement thereof is filed * * * within six years after the claim first accrues."

To this general rule of limitation the law contains several exceptions, among which, is one in favor of a person "beyond the seas" when the claim accrued.

A person thus situated, is entitled to a further limitation of three years after the disability has ceased within which suit may be brought. The findings show that the claimant continued to discharge the duties of consul at Hong-Kong until July, 1885; and that place being beyond the seas, the three years prescribed by the exception did not expire until July, 1888.

The contention arises as to what are official fees within the meaning of the law. The statute lying at the foundation of the controvery is as follows (Rev. Stat., sec. 1745):

"The President is authorized to prescribe from time to time the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several legations, consulates, and commercial agencies, and to adapt the same, by such differences as may be necessary or proper, to each legation, consulate, or commercial agency; and it shall be the duty of all officers and persons connected with such

legations, consulates, or commercial agencies to collect for such official services such and only such fees as may be prescribed for their respective legations, consulates, and commercial agencies, and such rates or tariffs shall be reported annually to Congress."

By this law the President is authorized not only to prescribe what shall be charged for a given service, but also "to designate what shall be regarded as official services." Not only is the compensation in
11 amount within the jurisdiction of the President, but the quality of the service, as to whether it shall be official or not official, is within the discretion and power of the Executive. This is true as to such fees as are not specifically disposed of by the terms of positive law, because we find in this section a classification of fees "such as are expressly declared by law." There is no claim on the part of the defense that all the fees sued for belong to that class of fees which "are expressly declared by law." We must then determine whether the fees collected by the claimant and paid into the Treasury are official fees within the meaning of the law, as affected by the action of the President and the statute.

The issue mainly turns upon the legal effect of the consular regulations in force during the performance of the services of the claimant, and if by those regulations the services charged for were official, then the payment into the Treasury was in pursuance of law, and there can be no recovery. The immediate predecessor of the claimant, by the employment of a third party, retained as expenses the fees collected from American and foreign ships for examination under the laws of the United States in relation to immigration; and among the first acts of the claimant when he became consul at Hong-Kong was to open communication with the State Department in relation to his fees, and more especially those under section 2162, Revised Statutes.

It is not necessary to notice in detail the correspondence between the claimant and the Department upon that subject; it is sufficient to note that they differed as to the rights of the parties to this suit under existing law and regulations. In order to avoid a conflict with the Government at that time the claimant accounted for all the disputed fees, not conceding the right of the Government to demand or retain them; and while he did not formally protest against the payment, he asserted such a right to the fees (if he would be otherwise bound) as does in law protect him in his claim to maintain a suit, without being subjected to the consequences of an estoppel.

"Estoppels are similar in strictness to foreitures and the enforcement of penalties. They are not favored defenses when the technicality of the estoppel can not be subordinated to its equity (Andrews v. Lyons, 11 Allen, 349; Lonesberry v. Depew, 28 Barbour, 44; Water's Appeal, 35 Pa. St., 523; Babcock v. Parry, 8 Ohio St., 270; State v. Pepper, 31 Ind., 76; Cape Ann Granite Co. v. U. S., 20 C. Cls. R., 1).

"An estoppel in pais operates only in favor of a person who has been misled in his injury, and he only can set it up (Ketchum v. Duncan, 96 U. S. R., 659)."

Public officers (upon the question of their compensation and the payment of money into the Treasury) are not bound, in order to save their rights, to place themselves in antagonism to the accounting officers of the Department, suffer themselves to be sued, and incur the odium for the time

of being in default; but have the right to pay into the Treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign.

If every payment of a disputed sum involves an estoppel against the officer, the party would be bound to assume the responsibility of litigating with the Government in the character of a defendant, instead of being in the preferable position of claimant.

No person has been misled by the act of the party in the payment of the disputed fees. No interest of the Government has suffered by the acquiescence of the claimant, for the time being, in the construction of the Department of the law of consular service. No rights have become
12 vested upon the faith of his acts, and no wrong can be done by the judicial investigation and determination of the issue presented by this record.

And while the claimant is not to be prejudiced by his course, the officers of the Department are not to be criticised for their vigilance and care in the protection of the rights of the defendant in the investigations and decision of claims against the Government. If they pay money unauthorized by law, that may be the end of the transaction, while if they withhold money when they are in doubt, the party has a speedy and efficient remedy in the courts to determine his rights.

"A payment into the Treasury of all fees and collections made by a collector under the authoritative requirement of the Department is not a voluntary payment, though made without protest, and does not prevent him from suing to recover back his percentage of the fees, etc. (Lawson's Case, 14 C. Cls. R., 332; affirmed, 104 U. S. R., 164)."

From the 4th day of February, 1879, to the 21st day of July, 1885, the claimant collected and paid to the United States the sum of $5,147 (excluding the amount refunded after the receipt of the communication of January 2, 1882) as fees for the examination of Chinese emigrants. Three thousand nine hundred and twenty-three dollars and fifty cents were collected prior to September 1, 1881, and $1,223.50 between September 1, 1881, and December 31, 1881.

Section 321, Consular Regulations of 1874, provides:

"All acts are to be regarded as 'official services' when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States."

Section 333 of said regulations is entitled a "tariff of fees," and embraces one hundred and seven items, but none of the specifications defines the fee of the consul as to an examination of Chinese emigrants. In the regulations of 1881, under section 496, under a "tariff of fees," specification 35, it is provided:

"To the examination required by section 2162 of the Revised Statutes, for each emigrant (Article XXI), 25 cents."

This is the first time we find any specific mention of consular fees under said section of the law, although by article 227 of the Regulations of 1874 consuls are called upon to prevent the transportation of coolies in the vessels of citizens of the United States, and to proceed against every American citizen engaged in trade in violation of section 2158 of the Revised Statutes. (Consular Regulations of 1874, p. 55.)

The sections of the statute upon which the contention is based are as follows:

"SEC. 2158. No citizen of the United States, or foreigner coming into or residing within the same, shall, for himself or for any other person, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare any vessel registered, enrolled, or licensed in the United States, for the purpose of procuring from any port or place the subjects of China, Japan, or of any other oriental country, known as 'coolies,' to be transported to any foreign port or place, to be disposed of, or sold, or transferred, for any time, as servants or apprentices, or to be held to service or labor.

"SEC. 2162. Nothing herein contained shall be deemed to apply to any voluntary emigration of the subjects specified in section twenty-one hundred and fifty-eight, or to any vessel carrying such person as passenger on board the same, but a certificate shall be prepared and signed by the consul or consular agent of the United States residing at the port from which such vessel may take her departure containing the name of such person, and setting forth the fact of his voluntary emigration from such port, which certificate shall be given to the master of such vessel, and the same shall not be given until such consul or consular agent is first personally satisfied by evidence of the truth of the facts therein contained."

13 Section 2158 by its terms refers to citizens of the United States or a foreigner coming into the United States or residing within the same, and to vessels "registered, enrolled, or licensed in the United States." No reference is made to a foreign ship or the acts of foreigners except as connected with a vessel registered, enrolled, or licensed in the United States.

The purpose of this section is to prevent the "cooly trade" in so far as that can be done by regulating the conduct of citizens of the United States and a certain description of foreigners in relation to ships directly affected by the navigation laws of the United States. It may be that beyond that limit Congress had no right to go, but it is not necessary to discuss and determine the boundary of Congressional power in this connection.

By reference to the Consular Regulations of 1881, page 115, it will be seen that paragraph 347 is preceded by the words, "duties as to American vessels engaged in the transportation of Chinese and other immigrants." Paragraph 347 then proceeds to state the illegality of certain transactions upon the part of citizens of the United States in relation to the emigration of Chinese. The whole of article 21 is devoted to the discussion as to the mode in which the forced emigration of persons may be avoided or prevented on the vessels belonging to the citizens of the United States, and no reference is made to ships which do not belong to citizens of this country.

In order to effect the purpose and policy of 2158, section 2162 was enacted. That voluntary emigration might not be obstructed, Congress provided that the consul or consular agent of the United States at the port of departure should make an examination of the crew so as to determine whether the emigration of all the passengers was voluntary or forced. Being satisfied that the law was not violated, the consul or consular agent was to certify for the master of the vessel that each emigrant was depart-

ing in the exercise of his free volition. Upon this section was framed the thirty-fifth specification of the four hundred and ninety-sixth section of the regulations of 1881, providing a fee of 25 cents for each emigrant.

Neither section 2162 of the statute nor classification 35 in the regulations of 1881 define specifically the character of the ship to be examined by the consul; so we are remitted to the provisions of section 2158 to ascertain the kind of vessel on which the consul is to exercise the jurisdiction and power of search. It must be a ship having the characteristics enumerated in that section before the consul is required to make the examination, and before he has the right to perform the service of making a certificate. The regulations of 1881 do not discriminate between American and foreign vessels, but simply provide a fee of 25 cents for every immigrant certified to under section 2162.

Full power is given the President under section 1745 not only to fix the compensation of official fees, but also "to designate what shall be regarded as official services."

We do not find by an examination of either the regulations of 1874 or 1881 that the President has exercised the power "to designate" as official service the examination of a ship not having the qualifications prescribed by section 2158. And as the law requiring examination does not apply to other vessels, we must conclude that in the examina-
14 tion of foreign vessels the consul performed a service not required by law, but gratuitous at the instance of a party desiring a certificate. The regulation of 1874 must be held to apply to such acts as are required by law to be performed by the consul in the discharge of his official duty as the consular representative of the Government.

If, for commercial convenience, parties apply to the consul to perform acts not inconsistent with law or a faithful discharge of his duty to the United States, and he performs the acts, they are paid for by the party, and the law does not require the consul to perform such acts in the absence of any designation by the President that such acts are "official services," the fees so paid become the private emolument of the consul, and not the money of the United States. The fact that the consul is employed because of his relations to the Government, and the further fact that he attaches his seal as evidence of the official character of the person performing the act, do not change the character of the compensation received by him from private to public or official fees, within the meaning of the statute and regulations.

The next charge is "for certifying extra copies of quadruple invoices." The sum paid into the Treasury, and which has not been refunded by the Comptroller, of that class of fees amounts to the sum of $1,592. All such fees paid after the regulations of 1881 took effect have been refunded and are not now in controversy in this proceeding. The sections of the law under which said service was rendered are as follows (Revised Statutes):

"SEC. 2853. All invoices of merchandise imported from any foreign country shall be made in triplicate, and signed by the person owning or shipping such merchandise, if the same has actually been purchased, or by the manufacturer or owner thereof, if the same has been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, manufacturer, or owner.

* * * * * * *

"SEC. 2855. The person so producing such invoice shall at the same time declare to such consul, vice-consul, or commercial agent the port in the United States at which it is intended to make entry of merchandise; whereupon the consul, vice-consul, or commercial agent shall indorse upon each of the triplicates a certificate, under his hand and official seal, stating that the invoice had been produced to him, with the date of such production, and the name of the person by whom the same was produced, and the port in the United States at which it shall be the declared intention to make entry of the merchandise therein mentioned. The consul, vice-consul, or commercial agent shall then deliver to the person producing the same one of the triplicates, to be used in making entry of the merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise."

The regulations of 1874, among other provisions on the subject of invoices, provides in paragraph 49: Consular officers will on the request of the proper collectors supply them free of charge with copies of any such documents on file in their offices as they may need in the discharge of their official duties.

Copies prepared by other persons for their own use will on request be certified on the payment of $2. When, however, duplicates of originals are required, or the copy is prepared by the consul, the schedule fee will be exacted as for the original service.

In the regulations of 1881 it is provided—

* * * "copies prepared by other persons for their own use will on request be certified on the payment of $2. When, however, duplicates of originals are required, or the copy is prepared by the consul, the schedule fee will be exacted as for the original service."

15 The above extracts comprise the sections of the statute and paragraphs of the regulations which bear upon the question of the right of the claimant to the fees embraced in the second item of the claim, to wit, "For certifying extra copies of quadruple invoices." The term "quadruple" is not used in the statute nor in the regulations prior to act of June 10, 1880 (21 Stat. L., 173).

By that act provision is made for quadruplicates by name, but it is provided—

"That no additional fee shall be collected on account of any service performed under the requirements of this section."

The tariff of fees embraced in paragraph 333 of the Consular Regulations of 1874, in item 36, prescribes a fee of $2.50 for "invoices including declaration in triplicate."

Nothing is said in the statement of fees as to copies, but paragraph 491 prescribes a fee of $2. This charge is for certifying extra copies of quadruplicate invoices, and can only be performed under the seal of the consular office.

The act pertains to a duty specifically described by the laws of the United States, and, upon a tender of the fee, the party making application is entitled to have a certificate attached to the instrument, if it is a copy of the document executed in triplicate. The party being entitled to the certificate, it is the duty of the officer to attach his official seal upon pay-

ment of the fees. This is an official duty, and the emolument becomes an official fee.

The third item of charge in claim is—

"For certifying invoices for goods in transit through the United States to other countries, $5,805."

This amount was collected by claimant during the time he officiated as consul at Hong-Kong, and was paid into the Treasury. For the purpose of avoiding delay and annoyance the shippers of goods through the United States procured from the consul what is called "transit invoices." They are not the invoices referred to in the sections of the statute above quoted, but such invoices as accompanied goods in transit through the United States. The law did not require the consul to issue such certificates, and hence no provision was made for them either in the regulations of 1874 or 1881. Nor do the regulations of the Treasury Department require the consuls to perform any duty in relation to such goods. (Gen. Reg. Treas. Dept., 1884, p. 361.)

The next item for which claimant seeks a judgment is the sum of $644.01 "for notarial and clerical work," composed of the following charges:

(*a*) Fees collected from February 4, 1879, to December 31, 1880, for recording instruments	$39.29
(*b*) Fees collected from February 4, 1879, to September 30, 1880, for cattle-disease certificates	152.00
(*c*) Interest on deposits in bank at Hong-Kong from February 4 to June 30, 1882	104.51
(*d*) Fees collected from February 4, 1879, to December 31, 1879, for acknowledgments and authentications of signatures notary public and certifying their official character	48.00
(*e*) Fees collected during fourth quarter, 1881, for "certificates of shipments" or extra invoices	292.00
(*f*) Five per cent. commission on the estate of Alice Evans, May, 1881	8.21
	644.01

16 The first charge is for recording instruments; but it does not appear from the specification or proof what was the character of the instruments recorded, and it is therefore impossible to determine whether the recording came within the regulations of 1874 or 1881. For aught we know, the instruments may have been those specially provided for by the tariff of fees in the regulations prescribed by the President. The item of $152 is for cattle-disease certificates, and we find nothing in the laws of the United States nor in the regulations in relation to the duties or powers of a consul with reference to "cattle-disease."

The next item is for interest recovered by the claimant on deposit in a Hong-Kong bank from February 4, 1879, to June 30, 1882.

The funds of the United States in the hands of consuls are in legal contemplation in the personal custody and control of such officers; and for the purpose of protecting such funds, a safe is provided at the expense of the Government, in which they may keep the money coming into their hands as officers of the United States.

While it is their right to use the safe for the purpose of a depository, having given a sufficient bond to protect the United States against loss, if they chose to make a deposit in a bank, they and their sureties being responsible for the money, the act contravenes no positive law.

As applicable to this claim the law of trusts and trustees must be invoked, as the statute and regulations make no provision on the subject. The money of the Government in the hands of a public officer is a trust fund, and such officer must deal with it for the sole benefit of his trustee.

Public officers differ from the ordinary trustee in not being required to make any investment of funds for the accumulation of interest. Their sole duty is to safely keep and account for the funds of the United States. The fundamental law of trust is, that the trustee can not derive any benefit from the trust except such as are specifically provided as his compensation. All profits and accretions become in his hands a part of the trust, for which he must account to his "cestui que trust."

When the money was paid by the bank it became a part of the fund in the hands of the consul, attaching itself and becoming a part of the trust fund in the hands of the consul, subject to the paramount claims and rights of the United States. Upon its payment into the Treasury it passed in law to the United States as effectually as a surplus of the original fund would have passed.

"Trustees can not make any advantage to themselves out of the trust funds; and if they make more than legal interest they shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money (Perry on Trusts, sec. 468; Barney v. Saunders, 16 Howard, 543; Martin v. Rayburn, 42 Ala., 468)."

Item *d* is for—

"Fees collected from February 4, 1879, to December 31, 1879, for acknowledgment and authentication to the signature of ourfficial character of notary public, $48."

It is not perceived how such a service became necessary, but inasmuch as it was rendered to a party desiring it, and as there is no law of the United States making it the duty of the consul to render such a service, the claimant is entitled to the amount received.

Item *e*—

"For fees collected during the fourth quarter of 1881 for certificates of shipment of extra invoices."

17 This charge embraces the same character of services that are charged for in the second specification of fees alleged in the petition.

Item *f* is for fees in the settlement of the private estate of Alice Evans. For this service on the part of a consul we find no regulation or law, and being of a private nature it is not perceived on what principle he is to account to the Government for such collections.

The fifth claim as alleged is—

"For services to foreign-built vessels carrying the American flag."

During the official term of the claimant he paid to the defendant the sum of $584 on account of fees collected for shipping and discharging seamen in foreign vessels sailing on the Chinese coast under the United States flag.

It is insisted by claimant that while he was "empowered" to perform the services he was not required to do so by any statute of the United States; and the performance of the service not being required by law he has a right to all charges paid for such service.

Paragraph 194, Regulations 1881, says:

"In the case of American or foreign-built vessels purchased abroad and wholly owned by American citizens, it is known that the crews are usually made up of men who are not American citizens, and who have not acquired the character of American seamen under the law, as set forth in paragraph 198. Seamen of this class, when not serving under a contract made in the United States, are not regarded as within the jurisdiction of a consular officer as to their shipment or discharge."

In the regulations of 1874, paragraph 131, the power and duty of a consul in relation to "discharge of seamen" is defined as follows: The statutory authority of a consul to act in this respect is limited to (1) the sale in a foreign country of a ship or vessel belonging to a citizen of the United States; (2) the discharge, with his own consent, of a seaman or mariner being a citizen of the United States; (3) a discharge after a survey of a vessel and finding of the same unseaworthy. The duty performed in this instance was shipping and discharging seamen in a foreign-built ship sailing on the Chinese coast under the United States flag. The seamen were not American citizens, and did not ship from a port of the United States so as to come within the provisions of paragraphs 129 and 130 of the regulations of 1874.

Article 128 of the regulations of 1874 defines in a general way who are to be regarded as seamen within the meaning and purpose of "that act," but the second clause of article 131 is more specific in its definition of the duty of a consul in relation to seamen.

The last and sixth charge in the claim is—

"For certifying invoices for goods exported to the United States which were on the free list."

For the performance of that service the claimant has collected and paid into the Treasury the sum of $2,095. The legal theory upon which the claim is based is, that the law does not require an invoice on goods not subject to a tax; that as consul he has no official duty to perform towards that class of goods; that the service is performed at the instance of the shipper for his convenience; that it is a matter purely personal between the consul and the party who voluntarily pays the fees; and that, as the Government is not interested in the goods, there can be no obligation on the part of the consul to account to the United States for such fees.

18 Section 2851 of the Revised Statutes prescribes a fee of $2.50 for every verification of an invoice or certificate before a consul or commercial agent. Section 2852 makes the value of the invoice evidence of the value of the goods in any court of the United States. Section 2853 provides for triplicate invoices, and section 2854 provides that all such invoices shall, before the shipment of the goods, have indorsed on them a declaration signed by the purchaser, manufacturer, owner, or agent showing, if subject to ad valorem duty, the value of the goods, and if subject to specific duty the quantity of the same, and that no other invoice differing from the one set forth in such declaration will be furnished to any one. If the merchandise was actually purchased, the certificate shall show that the currency of the invoice and the purchase is the same.

This is the substance of the different sections of the Revised Statutes which affect the question in dispute. The purpose in this particular is evidently to so guard the transportation and shipment of goods that the

revenue of the United States shall be protected against the importation of goods having a duty imposed on them as a tariff either ad valorem or specific without the payment of that duty. The invoices provided by law have in view that direct purpose, and the different requirements of section 2854 clearly identify the character of invoices contemplated in the preceding sections of the law.

The certificate to an invoice of goods, free of duty so far as the requirements of the statute goes, is not within the spirit and purpose of the law and must be held as a non-official paper. The regulations of 1874 and of 1881 prescribe a fee in the tariff of fees for certifying to an invoice of goods, but did those regulations intend to go beyond the statute and prescribe as official a fee which in legal contemplation the consul was not expected to earn or collect? While the President has full control of the question of determining what shall and what shall not constitute official fees, it must appear clearly from the regulations that he intended to include in official fees (which must be accounted for) the charges and collections for non-official acts before such charges and collections become proceeds in the hands of a consul liable to the demands of the Government.

It is the judgment of the court that the claimant recover the sum of $13,839.21 for the different items indicated by this opinion.

19 VI.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 3rd day of December, 1887, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said John S. Mosby do have and recover of and from the United States the sum of thirteen thousand eight hundred and thirty-nine $\frac{21}{100}$ ($13,839.21).

20 VII.—*Application for appeal by defendants.—Filed Feb'y* 14, 1889.

From the judgment rendered in the above-entitled cause, on the 3rd day of Dec'r, 1888, in favor of claimant, the defendants, by their Attorney-General, on the 14th day of Febr'y, 1889, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Allowed in open court, March 11, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

21 VIII.—*Application for appeal by claimant.—Filed Feb'y* 25, 1889.

And now comes the claimant and hereby takes an appeal from the judgment rendered in this cause to the Supreme Court of the United States, and asks that the same may be allowed.

JOHN S. MOSBY,
By his attorney W. WILLOUGHBY.

Allowed in open court, M'ch 11, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

22 In the Court of Claims.

IX.

JOHN S. MOSBY
vs.
THE UNITED STATES. } No. 15586.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the United States, and of the claimant, respectively, for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 14th day of March, A. D. 1889.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1522. The United States, appellant, *vs.* John S. Mosby. Filed March 15, 1889. No. ———. John S. Mosby, appellant, *vs.* The United States Court of Claims.

In the Supreme Court of the United States.

OCTOBER TERM, 1869.

THE UNITED STATES, APPELLANT,
vs.
JOHN S. MOSBY. } No. 1112.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF THE MOTION TO ADVANCE.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT,
vs.
JOHN S. MOSBY.
No. 1112.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF THE MOTION TO ADVANCE.

The claimant, and appellee, sued the United States for certain fees which, it is alleged, had accrued to him while United States consul at Hong-Kong, China; that is to say, $5,016, for examining Chinese emigrants departing on foreign vessels to the United States; $2,000 for certifying extra copies or quadruplicate invoices; $5,805 for certifying invoices for goods to be carried through the United States to other countries; $644.01 for notarial and clerical work;

$500 for services to foreign-built vessels carrying the American flag; $15,000 for certifying invoices of goods on the free list, for which no invoice was required by law as a condition of entry.

These sums were paid to the claimant and appellee and by him paid into the Treasury in obedience to the orders of the Department of State.

The court rendered judgment for the claimant in the sum of $13,839.21.

The grounds upon which it is conceived the public interests require that this cause should be decided by this court at an early day are set forth in the following letter from the Secretary of State:

DEPARTMENT OF STATE,
Washington, October 12 1889.

The Honorable the ATTORNEY GENERAL:

SIR: Referring to the letter written by this Department on February 13th last, requesting that an appeal be taken from the decision of the Court of Claims in the case of John S. Mosby *vs.* the United States, No. 1586, on the docket of the Court of Claims, I have the honor to make the further suggestion that an early settlement, by final adjudication in the Supreme Court of the United States, of the important questions therein raised, would be of advantage to the Government, in that it would furnish authority and precedent for the guidance of this Department in the disposition of similar matters which are constantly coming before it for adjustment, or for other action thereupon.

As an instance I will cite that the decision by the Court of Claims, in this case, that a consular invoice is not required by law for the importation of goods not subject to duty, has

elicited the inquiry from consular officers in China, Japan and other countries from which free goods are shipped to the United States in large quantities, whether they shall continue to certify invoices of free goods, and whether they shall turn into the Treasury the fees collected for such service—Mosby having been adjudged the owner of such fees collected by him while consul at Hong-Kong. While this question is pending in the Supreme Court this department can not instruct its officers as to their proper conduct in the premises, nor as to their legal rights and liabilities in regard to the fees collected for certifying invoices of free goods.

For these reasons I have the honor to request that you will endeavor to have the case of *Mosby* v. *The United States* set for an early hearing by the Supreme Court.

I have the honor to be, sir, your obedient servant,

JAMES G. BLAINE.

It is, accordingly, respectfully asked that the cause may be advanced for argument on an early day of the present term.

WM. A. MAURY,

Assistant Attorney-General.

Office Supreme Court U. S.
FILED.
JAN 10 1890
JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT, *vs.* JOHN S. MOSBY. } No. 1112.

JOHN S. MOSBY, APPELLANT, *vs.* THE UNITED STATES. } No. 1420.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT,
vs.
JOHN S. MOSBY. } No. 1112.

JOHN S. MOSBY, APPELLANT,
vs.
THE UNITED STATES. } No. 1420.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

These are cross appeals, and will be considered separately.

The Appeal by the United States.

The claimant and appellee sued the United States for certain fees which, it is alleged, had accrued to him while United States consul at Hong-Kong, China: that is to say, $5,016, for examining Chinese emigrants departing on foreign vessels to the United States: $2,000 for certifying extra copies or quadruplicate invoices: $5,805 for certifying invoices for goods to be carried through the United States to other countries: $644.01 for notarial and clerical work: $500 for services to foreign-built vessels carrying the American flag; $15,000 for certifying invoices of goods on the free list, for which no invoice was required by law as a condition of entry.

These sums were paid to the claimant and appellee and by him paid into the Treasury in obedience to the orders of the Department of State.

The Court of Claims, proceeding on the principle that the claimant was not accountable to the Government for fees not declared to be official by the laws or the consular regulations of the

United States, gave judgment for the claimant for the sum of $13,839.21, which is made up of the following items:

For examining Chinese emigrants departing on foreign vessels to the United States	$5,147.00
For certifying invoices of goods through the United States	5,805.00
For items *b*, *d*, and *f*, in Finding XII	208.21
For services to foreign-built vessels carrying the American flag	584.00
For certifying invoices of goods imported to the United States which were on the free list	2,095.00

The Government appealed from this judgment on the ground that no part of the claim was well founded.

Assignment of Error.

The appellant assigns as error in the said judgment that no item of the said claim is founded in law, and, consequently, that the petition of the claimant should have been dismissed.

ARGUMENT.

The claimant contends that the fees collected by him *in the use of his office and official seal as consul of the United States at Hong-Kong*, in matters as to which he was not required to act by

any law or regulation of the United States, and which have been paid by him into the Treasury, by order of the Secretary of State, are *his private property*, for which he is under no duty to account to the United States, and which he is entitled to have refunded to him.

By Schedule B, II, section 1690, Revised Statutes (p. 297), the pay of consul of the United States at Hong-Kong *is fixed at* $3,500. By section 1747, Revised Statutes, "all fees collected * * * by the consuls * * * mentioned in Schedules B and C * * * , or by any other persons in their behalf, shall be accounted for to the Secretary of the Treasury, and held subject to his draft or other directions."

Section 1745, Revised Statutes, has an important bearing on this controversy. It is as follows:

> The President is authorized to prescribe, *from time to time*, the rates or tariffs of fees to be charged for official services, *and to designate what shall be regarded as official services, besides such as are expressly declared by law*, in the business of the several legations, consulates, and commercial agencies, and to adapt the same by such differences as may be necessary or proper, to each legation, consulate, or commercial agency; and it shall be the duty of all officers and persons connected with such legations, consulates, or commercial agencies, to collect for such official services such and only such fees as may be prescribed for their respective legations, consulates, and commercial agencies, and such rates or tariffs shall be reported annually to Congress.

It was clearly the intention of Congress, by section 1745, to invest the President with a continuing authority to add to the duties of consuls prescribed by law such other duties as the wants of our citizens in foreign countries might suggest. To that end he is empowered "*from time to time*" to "*designate what shall be regarded as official services.*"

It would be a serious mistake, in dealing with this subject, to suppose that this power of the President to designate from time to time what shall be regarded as official services is limited to services of a strictly Federal character, for to do so would be to lose sight of the object of the office of consul. To this office it belongs by an almost immemorial usage to render services to the citizen which are in no way beneficial to the Government of the United States, and yet which it is the duty of that Government to provide for under its power and duty to look after the interests of its citizens in foreign countries.

The Constitution merely gives the President the power to appoint consuls, with the advice and consent of the Senate (Const., Art. 2, sec. 2).

It does not define the duties of consuls, and for those duties necessarily refers to the usages of nations.

The duties of consuls are thus defined:

> Consuls are persons appointed by a state to reside in foreign countries, and permitted by the government of the latter to reside, for the purpose partly of watching over the interests of the subjects of the state by which they are appointed, and partly of doing certain acts on its behalf which are important to it or its subjects, but to which the foreign country is indifferent, it being either unaffected by them, or affected only in a remote and indirect manner. Most of the duties of consuls are of the latter kind. They receive the protests and reports of captains of vessels of their nation with reference to injuries sustained at sea; they legalize acts of judicial or other functionaries by their seal for use within their own country; they authenticate births and deaths; they administer the property of subjects of their state dying in the country where they reside; they send home shipwrecked and unemployed sailors and other destitute persons; they arbitrate on differences which are voluntarily brought before them by their fellow-countrymen, especially in matters relating to commerce, and to disputes which have taken place on board ship; they exercise disciplinary jurisdiction, though not of course to the exclusion of the local jurisdiction, over the crews of the vessels of the state in the employment of which they are; they see that the laws are properly administered with reference to its subjects, and communicate with their government if injustice is done; they collect information for it upon commercial, economical, and political matters.
>
> In the performance of these and similar duties the action of a consul is evidently not international. He is an officer of his state to whom are intrusted special functions which can be carried out in a foreign country without interfering with its jurisdiction. His international action does not extend beyond the unofficial employment of such influence as he may possess, through the fact of his being an official and through his personal character, to assist compatriots who may be in need of his help with the authorities of the country. If he considers it necessary that formal representations shall be made to its government as to treatment experienced by them or other matters concerning them, the step ought in strictness to be taken through the resident diplomatic agent of his state, he not having himself a recognized right to make such communications. (Hall's Int. Law, 263, §105, Oxford, 1880; see also 1 Kent Comm. [41].)

It would, therefore, seem from the nature of the consular office, to be the duty of the President to see to it that the circle of duties of that office is, at all times, such as to meet the wants of our people in foreign countries, by making it embrace all acts which the convenience of the people may require, whatever those acts may be, provided they be such as may properly be exercised in other countries by officers deriving authority from this country.

That Congress took this view in legislating on this subject would appear by section 1718, Revised Statutes, for it there declares that consuls shall render to masters or commanders of vessels any service which consuls are "authorized by law *or usage officially to perform*." It is true that it is also required that the service shall be such as comes within "the rates or tariff of fees," but this section shows that Congress regarded it as within the competency of the President to extend the official duties of consuls to acts sanctioned by "*usage*," as well as law. This further appears by section 1714, Revised Statutes, where it is declared that:

The specification in this title of certain powers to be exercised and duties to be performed by consuls and vice-consuls, shall not be construed as implying the exclusion of others *resulting from the nature of their appointments*, or prescribed by any treaty or convention under which they may act.

The power of the President to add to the list of consular duties "from time to time," as he may see fit, makes it entirely unnecessary that consuls should step outside of the duties prescribed by the Executive. The enumeration of those duties in the President's regulations would seem to be exclusive and prohibitory as to all other matters, whether intended to be so or not, as we shall now endeavor to show.

THE CLAIM IS AGAINST PUBLIC POLICY.

A public office is a public trust, and, being a public trust, it would seem to be against sound policy to allow the officer holding it to derive any profit from it not provided for by law.

This policy is dictated by the consideration that if the rule were that an officer might appropriate

to himself the profits of his office over and above what the law gives him it would place a dangerous temptation before him to use his office for private gain, to the detriment of the public interests.

This is the rule in the case of private trusts of all kinds, it being well settled that if a trustee uses the trust subject for his own advantage, all profit thus derived belongs to the *cestui que trust* and must be accounted for to him. Indeed, this principle was applied by the court below in rejecting the item of his claim representing interest that had accrued on certain public money deposited in bank by the claimant.

There can be no doubt that this principle was established by courts of equity for the purpose of diminishing the temptations to fiduciaries to abuse their trusts.

Is there any good reason why this salutary rule should not be equally applicable to public offices and other public trusts?

There can be no question that the claimant in this case used his public trust for the purpose of making profit out of it which the law did not

sanction. The money he now claims was paid him for services performed as consul, for, although outside the prescribed list of official duties, those services were performed *colore officii*. If he had not performed them as a public officer, to wit, a consul of the United States, performance of them would not have been requested. The use of the *official name and seal* were essential to the performance desired, and it was the official name and the official seal that were paid for by the persons to whom the services were rendered.

If consuls were permitted to make profit out of their offices by using their official name and seal in every way in which merchants and others might see fit to require in their transactions, it is not at all improbable that an amount of business, outside the consular regulations, would sometimes grow up which would occupy the attention of consuls to the injury and inconvenience of persons interested in the performance of the prescribed consular duties, particularly if the voluntary duties should be more profitable than the strictly official, as would generally be the case.

The way to prevent such abuses from growing

up, or to remedy abuses already existing, would seem to be to require consuls to account for profits earned outside the regular tariff of fees as so much money gained by perverting their offices to their own private advantage.

So long as this objectionable practice is allowed to continue consuls will be tempted to withhold from the President the information which he needs to enable him to adapt the list of official duties to the public wants; for every service added to the regulations is a perquisite lost to the consuls. It is not improbable that the absence from the regulations of reference to some services, usually performed by consuls, is, in no small degree, owing to the indisposition of consuls to jeopard, by giving information, perquisites of office for which it has not been usual to make them account to the Treasury.

The practice, which has so long obtained, of suffering consuls to treat as their private property all fees outside the official tariff, is an abuse, causing irregularity and injustice in the consular service—an abuse which must have produced

results that Congress never contemplated in fixing the compensation of consuls.

These considerations are not referred to in the case of United States *v.* Badeau (33 Fed. Rep., 572, and S. C. 31 Fed. Rep., 697), where Judge Brown, in the district court, and Judge Wallace, in the circuit court, held that the defendant, Badeau, as consul-general at London, was not accountable for fees received outside the regular tariff, and that consular officers could not, under the law, be made accountable for fees not growing out of services directly connected with the administration of the Government. This is, indeed, a narrow view of the subject, and seems to render it impossible for the President to stamp as official the many useful services that consuls perform but which have no governmental relation. These learned judges seem to lose sight, completely, of the true nature of the consular office and of a large and necessary department of consular duty recognized by the usages of nations.

Claimant is Forbidden by Law to Receive the Fees Claimed.

As we have seen, the claimant had a fixed salary of $3,500, and was compellable by law to account for all fees growing out of official services. Could he, under the law, appropriate fees for services not made official by the regulations? We submit that he could not under section 1765, Revised Statutes, which is as follows:

> No officer *in any branch of the public service*, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, *in any form whatever*, for the disbursement of public money, *or for any other service or duty whatever*, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

The services rendered by the claimant were consular, although not designated "official" by the President. The consular name and seal were used, and the profit, therefore, derived from their performance directly appertained to the consular office. If not, then a register of deeds might refuse to account for fees for recording instruments not required by law to be recorded; a position which it would seem to be difficult to maintain

on the ground that such services were not official.

This case would seem to fall directly within the principle of the case of *Yates* v. *National Home* (103 U. S., 674), where it was held that a deputy governor of an asylum for disabled soldiers who had performed services for the asylum outside of his official duties, with the understanding he was to be paid for them, could not recover in the face of a regulation of the institution substantially the same as section 1765. This court remarks in its opinion, delivered by Mr. Justice Harlan, that—

> The manifest object of the by-law in question was to remove from the officers of the asylum, charged with the immediate conduct of its affairs, all possible temptation to so manage the institution as to derive pecuniary advantage therefrom beyond their respective salaries or stated pay.

Is there a word of this utterance of the court that is not applicable to the case at bar?

Indeed, this case is a stronger one for the application of the prohibition than the case just cited, because here the services performed were such as are customarily performed by consuls, but in the case cited the services did not appear to be at all connected with the duties belonging to the position of deputy governor of the asylum.

Certifying invoices of free goods.

The court below allowed the claimant $2,095 "for certifying invoices of goods imported to the United States which were on the free list."

This item of the claimant's demand is of no little importance, and if the view of the court below is sustained it will involve a great diminution of the revenue of the Government from consular fees.

The ground taken by the court (pp. 14, 15) was that as the statutory requirement that consuls shall indorse the prescribed certificate on invoices was for the protection of the revenue, such requirement can have no application to merchandise entitled to free entry.

But it will be perceived that section 2853, R. S., requires that "all invoices of merchandise imported from any foreign country shall be made in triplicate," etc., and that section 2854, R S., requires that "*all* such invoices" shall be produced before the consul, vice-consul, or commercial agent of the United States, etc., and that section 2855, R. S., requires the consular certifi-

cate on "such invoice," and that section 2860 provides that: "Except as allowed in the four preceding sections, *no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of sections* 2853, 2854, *and* 2855, *and has thereon the certificate of the consul, vice-consul, or commercial agent in those sections specified*, nor unless the invoice is verified at the time of making such entry by the oath of the owner or consignee, or of the authorized agent of the owner or consignee, certifying that the invoice and the declaration thereon are in all respects true, and were made by the person by whom the same purports to have been made, *nor, unless the triplicate transmitted by the consul, vice-consul, or commercial agent to the collector has been received by him.*"

In addition to these explicit provisions, paragraphs 462 (1874) and 637 (1881) of the Consular Regulations require that "*all* invoices of importations" from countries where there are consular officers shall be produced before them and certified by them.

It would seem, then, that the consular regulations make it the official duty of consuls to certify *all invoices* independently of any provision of law. The court below, however, held that notwithstanding the comprehensive language of the regulations, they must be taken to extend no further than the law as restricted by them.

It is submitted that the court was wrong in its interpretation both of the law and the regulations.

It is not for the consuls to decide the many delicate questions as to whether merchandise comes within the free list or not. These questions must be decided by the officers of the revenue at our ports of entry. The decision of a consul that a given importation is entitled to free entry is entitled to no weight whatever, and hence the manifestly safe course is to require all invoices to be certified by consular officers; otherwise, if a consul should erroneously withhold his certificate, because of opinion that the goods mentioned in the invoice are supposed to be entitled to free entry, the consequences of the

omission must be serious to the importer as well as to the Government.

To hold, then, that Congress intended to invest consular officers with the power of determining whether the goods specified in invoices are free or dutiable, is a view that is bound to produce a great public inconvenience in the administration of the customs laws, if it should be established.

It would seem, therefore, quite plain that the interpretation here contended for is the more reasonable, because it avoids the occasional serious public inconveniences which the interpretation of the court below must certainly produce.

It is therefore submitted that the judgment is erroneous and should be reversed, with directions to the court below to dismiss the claimant's petition.

John S. Mosby v. The United States.

In opposition to the appeal of the claimant it is not necessary to do more than refer to the previous discussion and the opinion of the court below stating the grounds on which it refused

to allow certain items of the appellant's claim.

The items, thus rejected, are as follows:

1. For certifying extra copies of quadruple invoices....	$2,000.00
2. Recording instruments at various times, between February 4, 1879, and December 31, 1880	39.29
3. Interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882)	104.51
4. Certificates of shipments, or extra invoices, collected during the December quarter, 1881, $2.50 each	292.00

It is submitted that the judgment of the court below as to such rejected items should be affirmed.

WM. A. MAURY,

Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT,
vs.
JOHN S. MOSBY. } No. 1112.

JOHN S. MOSBY, APPELLANT,
vs.
THE UNITED STATES. } No. 1420.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The following quotation from the opinion of the court, delivered by Mr. Justice Field, in *Oscanyan* v. *Arms Co.* (103 U. S. R., 273), is

apposite to what is advanced in the brief (pp. 8–12):

> All such positions [*i. e.*, public offices] are trusts to be exercised from considerations of duty and for the public good. *Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers.*

As applicable to the point that the "claimant is forbidden by law to receive the fees claimed" (Brief, p. 13), the following additional authorities are referred to: *United States* v. *Shoemaker* (7 Wall., 338), *Hall* v. *United States* (91 U. S., 565), *Converse* v. *United States* (21 How., 471), *United States* v. *Saunders* (120 U. S., 126).

In *Converse* v. *United States*, in which the defendant below set-off against a demand of the United States commissions claimed to be due his intestate for services rendered by him to the whole Light-House Service of the United States, while he was collector of the port of Boston.

In answer to the contention that the compensation claimed in the set-off was prohibited by the act of August 23, 1842 (5 Stat., 510), now included in section 1765, Revised Statutes,

the Chief-Justice, referring to that act and others, *in pari materia*, said:

> But they can by no fair interpretation be held to embrace an employment which *has no affinity or connection, either in its character or by law or usage*, with the line of his official duty, and where the service to be performed is *of a different character and for a different place*, and the amount of compensation regulated by law.

It would seem clear that the services in question on this appeal can not be said to have "*no affinity or connection*" either "*in character*" or "*by law or usage*" with the office of consul.

But there was a strong dissent from the opinion of the court by Campbell, Grier, and Catron, J. J., who adopted the opinion of Mr. Justice Curtis, in the court below, who had recently resigned his place as a member of this court, and whose great name adds to the weight of the dissent.

The opinion thus adopted takes the ground that the services claimed are forbidden by the act of 1842.

It will be observed that the commissions claimed in that case were commissions "upon certain contracts, purchases, and disbursements, made by him [the defendant's intestate] for oil

and other articles for the light-house service of the United States, under direction of the Secretary of the Treasury," yet it was maintained by the dissenting judges that the claim could not be recognized because the defendant's intestate was collector of the port of Boston, with a fixed salary, at the time the services were rendered for which the commissions were claimed and because the appropriation under which compensation was claimed was not for extra pay *specifically.*

It would seem to be properly deducible from the opinion of the court, that if the particular services in that case had had any relation to or affinity with the office of collector of customs "*by law or usage*," they would have been regarded as within the prohibition of the act of 1842. That case is, therefore, an authority which materially supports the position taken by us in the case at bar.

It is perfectly well understood that the consular fees, outside the regular tariff, collected in London, Paris, Liverpool, Manchester, and other places, are very large. Such fees are known to be sometimes exorbitant The notarial fees *alone*

taken in by the consul-general at Paris last year amounted to not less than $25,000. All these fees *were official perquisites.* It is believed that the consular notarial fees collected at London are nearly as large. The salary of the consul-general at London is $7,500 and at Paris $5,000.

As was said by the Chief-Justice in *Converse* v. *United States*, it is "more consistent with the nature and character of our institutions to fix by law the compensation" for official services. When Congress has said that a consular officer shall receive a certain compensation, it is beyond the competency of another department of the Government to allow a greater compensation.

It would seem an undeniable proposition that under our system offices "are created for the benefit of the public, *and not granted for the benefit of the incumbent*" (*Conner* v. *Mayor*, 1 Selden, 285; *Coffin* v. *State*, 7 Porter (Ind.), 157); but it would be plainly at war with this fundamental principle to countenance, in any degree, a custom in any branch of the public service by which officers are suffered to use their offices for private

profit beyond what the law permits. This is expressly done by the United States consular regulations, which recognize various services which consuls are called on to render, and discharge them from the duty to account for them.

It would seem, however, that all such services should be included in the official tariff of fees. It is not just to our citizens traveling in other countries to compel them to submit to such charges as our consuls may choose to make. The laws of some of the States and Territories require or give effect to acknowledgments of deeds and other instruments in other countries taken and certified by consuls, and it would seem that the reason for including such services in the official tariff is imperative.

To say, then, that such services, known and understood to appertain to the consular office, are not official or had no connection with the office because not mentioned in the official tariff, is to disregard substance and give effect to mere form, and to nullify the statutory declaration contained in section 1765, R. S.

Jurisdiction.

This court has no jurisdiction to entertain the appeal of the claimant, John S. Mosby, the amount in controversy, as to him, being less than $3,000. (See section 707, Revised Statutes.)

The items of his claim rejected by the court are as follows:

1. For certifying extra copies of quadruple invoices (pp. 10, 11)	$2,000.00
2. Recording instruments at various times between February 4, 1879, and December 31, 1880 (p. 12)	39.29
3. Interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882), (pp. 12, 13)	104.51
4. Certificates of shipments, or extra invoices, collected during the December quarter, 1881, $2.50 each (pp. 14, 15)	292.00

The aggregate of these rejected items being only $2,435.80, it would seem that the claimants appeal must be dismissed.

Respectfully submitted.

WM. A. MAURY,
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CONSULAR FEES.

IN THE

Supreme Court of the United States.

No. 1522.

THE UNITED STATES, *Appellant,*
vs.
JOHN S. MOSBY, *Appellee.*

AND

JOHN S. MOSBY, *Appellant,*
vs.
THE UNITED STATES, *Appellee.*

Appeals from the Court of Claims.

BRIEF FOR CLAIMANT.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 1522.

THE UNITED STATES, *Appellant,*
vs.
JOHN S. MOSBY. *Appellee.*

AND

JOHN S. MOSBY, *Appellant,*
vs.
THE UNITED STATES. *Appellee.*

Appeals from the Court of Claims.

BRIEF FOR CLAIMANT.

STATEMENT OF THE CASE.

The claimant, who was consul for the United States at Hong-Kong (a British colony on the coast of China) from February 4th, 1879, until July 22d, 1885, claims certain fees, which were collected by him during that period for services performed, and turned into the Treasury. On the final settlement of his accounts he asked to be credited by the amount of them, on the ground of their having been erroneously paid to the Government: the First Comptroller of the Treasury refused. When he assumed charge of the office the Consular Regulations of 1874 were in force; these were superseded by the Regulations which took effect September 1st, 1881. The fees were (Finding IX) "for certificates of shipment of merchandise *in transit* through the United States to other countries;" (XI) for fees collected "for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag;" and "on account of invoices certified by him for *free* goods imported into the United States;" (X) fees for cer-

tifying *extra* copies or quadruplicate invoices for goods shipped to the United States. The said sum for extra invoices was collected *prior* to September 1st, 1881. (Those collected for *extra* copies or quadruplicate invoices *after* September 1st, 1881, were refunded by the Comptroller.) (XII) Miscellaneous or notarial fees accruing as follows:

(*A.*) Recording instruments at various times between February 4th, 1879, and December 31st, 1880.

(*B.*) Cattle disease certificates, collected in small items from time to time between February 4th, 1879, and September 30th, 1880

(*C.*) Interest on deposits in bank (public money deposited).

(*D.*) Acknowledgments and authentications of instruments, and certifying official character and signatures of notaries public.

(*E.*) Certificates of shipments or extra invoices (some as quadruplicates) collected during December quarter, 1881. These should be added to the sum claimed for quadruplicates (in Finding X).

(*F.*) Five per cent. commission on estate of Alice Evans.

II.

For examining Chinese emigrants going to the United States on foreign vessels: The Court finds that, "said fees were voluntarily paid by the masters and charterers of said vessels at whose solicitation the service was rendered, and were collected in good faith by the consul." Soon after assuming charge of the consulate, viz.: on February 21st, 1879, the claimant informed the Department of State—~~February 21st, 1879~~—that ever "since the enactment of the Act of February 19th, 1862, prohibiting the *coolie* trade, in which American vessels had been engaged, it had been the practice at Hong-Kong to procure for American and *foreign* vessels carrying Chinese passengers to the United States a consular certificate of the fact that they were free and voluntary emigrants. * * *" The Secretary of State replied, in substance, that the fee is an official fee and must be accounted for to the Treasury." (Finding III.) The consul gave written advice to masters and charterers of foreign vessels that no examination or consular certificate was required by law for Chinese emigrants going to the United States. They continued, however, to procure his examination and certificate until the Bothwell Castle, an English steamship, which sailed from Hong-Kong January 6th, 1882, by the consul's advice carried no certificate from him for her Chinese passengers, but a letter

to the Collector of Customs at San Francisco explaining the reason of it. "Said vessel entered the port of San Francisco without trouble about February 1st, 1882. All other foreign vessels after that time ceased to procure the said consular certificate." The State Department was informed of the action of the consul and acquiesced. *All* emigration fees collected up to December 31st, 1881, were turned into the Treasury. Those collected after that time were refunded to the parties who paid them The Comptroller was informed of the fact and passed the consul's accounts in which said fees were first credited and then charged back to the Treasury. The State Department wrote to the consul on January 3d, 1882, that emigration fees collected from foreign vessels "must be accounted for as official."

The claimant refused after that time to examine Chinese on foreign vessels. After July, 1882, he refused to examine them on United States vessels, and so informed the Department.

A consul is legally bound to collect all fees that would belong to the Government; it is, therefore, a contradiction in terms to say he can decline to perform an act the fee for which is official. One duty implies the other.

On February 21st, 1879, he wrote to the State Department, informing it that his predecessors for seventeen years had appropriated the emigration fees from both American and foreign vessels, and asked for instructions. The Department replied May, 1879, that, "It is now deemed to be the more advisable course to prescribe the fee as an official one, to be accounted for to the Treasury." When the Department instructed the Consul at Hong-Kong, in May, 1879, to turn the emigration fees into the Treasury, the Regulations of 1874 were in force, which prescribed no fee for this service; consequently the general rule was that all emigration fees were unofficial. When in January, 1882, it ordered him to turn the emigration fees from *foreign* vessels into the Treasury, the Regulations of 1881 were in force, which prescribed a fee for executing the "Coolie" Act on United States vessels. Of course, the general rule (Reg. 1881) was, that if a consul in China rendered this service to a *foreign* vessel, the fee was *unofficial* and his personal perquisite. So a *special* rule was made for the consul at Hong-Kong; or, rather, he was excepted from the general rule, and deprived of privileges which other consuls enjoyed. The Court of Claims finds (XII) that, "the payment by the claimant of these several sums of money into the Treasury, was for the purpose of avioding a controversy with the Department. Soon after the claimant was

removed from office (1885), and before a final settlement of his accounts, he made a demand that all fees now claimed be credited to him." The State Department instructed the consul August 26th, 1879, that, "the fees for acts which the consul is empowered, but not *required*, by law to perform and which relate only to private transactions, are *unofficial*." (XIV) The necessary conclusion from this instruction is that *official* fees can only be prescribed for those acts which the law *requires* a consul to perform. *But if no fee has been prescribed, if the Consul does the work he fixes the fee and it belongs to him.*

The Consular Regulations of 1863 (Sec. 145, p. 63), referred to the "Coolie" Act of February 19th, 1862, as follows: "The important act of Congress, approved February 19th, 1862, 'to prohibit the *coolie* trade by American citizens in American vessels,' is commended to the special consideration of *all* consular officers in China." The Regulations of 1870 and 1874, contain substantially the same. As they prescribed no fee for performing the service, the amount of it was within the discretion of the consul, and was, of course, treated *as unofficil*; as all *official* fees are prescribed by the President. The Regulations of 1881, for the first time prescribed a fee for executing the law. Article 21, Regulation 1881, page 115: "Duties as to *American* vessels engaged in the transportation of Chinese, etc."—paragraph 347, says: "It is made illegal by statute for *citizens* of the *United States* to participate with *their vessels* in the transportation of coolies, and the provisions of two obsolete acts were revived, and were made to apply to *vessels of the United States* engaged in the transportation of passengers from one port *without* the United States to another port *without* he United States. Consuls will at once report all violations of these statutes coming to their notice. It is understood that the British Courts at Hong-Kong have held that the traffic in *coolies* is the slave trade in another form, and therefore *piracy*." The *coolie* or slave trade being piracy under British law long before the enactment of the statute of February 19th, 1862, and as slavery did not exist in California. and *coolies* could not have been sold even if brought there, it is absurd to suppose that Chinese emigration from Hong-Kong to the United States, was within the mischief which the law intended to suppress.

Sec. 2,158 R. S. prohibits American vesssels from carrying *coolies* from China, or Japan, "to any *foreign* port, or place, to be disposed of, or sold, or transferred, for any time, as servants, or apprentices, or

to be held to service, or labor." Clearly the word "*foreign*" in the statute refers to ports outside the United States, and the evil it prohibits never existed in the portion of the United States to which Chinese were brought. If the prohibition had been intended to include emigration to the United States then it would have been made to apply to vessels of every nationality bringing Chinese to American ports. The wrong it designed to correct, was the conveying of kidnapped Chinamen from ports of China to Pern and other countries of Spanish America, where they were sold into slavery. At Hong-Kong there are the most stringent rules in regard to Chinese emigration, and a vessel is not permitted to clear carrying Chinese to South America. The Act of February 19th, 1862, was intended to operate on *American* vessels leaving Chinese ports for ports outside the United States, where British law could not reach them. The *coolie* Act has never been repealed, but has never been applied to vessels of *any* nationality sailing from Hong-Kong with Chinese emigrants for the United States, or any other country, since the claimant discontinued the practice in 1882 of examining them, and issuing certificates to masters.

The practice had grown up and existed seventeen years, under his predecessors, with the knowledge and approval of the State Department; in accordance with its instructions he continued it for sometime; finally on his own responsibility he abolished it. The State Department acquiesced, but gave no sign of approval or disapproval, except silence. (Findings IV, V.)

Points and Authorities.

All *official* fees to be charged by United States officers are prescribed by statute, except consular fees. Section 1,745, Revised Statutes, says: "The President is authorized to prescribe, from time to time, the *rates* or tariffs of fees to be charged for *official* services, and to designate what shall be regarded as *official services*, besides such as are expressiy declared by law, in the business of the several legations, consulates and commercial agencies, and to adapt the same by such differences as may be necessary or proper to each legation, consulate or commercial agency; and it shall be the duty of all officers and persons connected with such legations, consulates or commercial agencies to collect for such *official* services such, and only such, fees as may be prescribed for their several legations, consulates and commercial

agencies, and such *rates* or tariffs shall be reported annually to Congress." The President is thus invested with a legislative power to prescribe the rates of *official* fees, and to designate what shall be regarded as official services. To guard against the construction that his power would be exhausted by exercising it once, he is authorized to do so "from time to time." Before the Act of 1856, on which the United States consular establishment is now based, all fees were prescribed by statute. This grant of legislative power to the President, being in derogation of the principles on which the functions of the government are distributed, must be strictly construed. In the case of *Bank* vs. *Okely*, 4 Wheat., 241, the Supreme Court said: "We readily admit that the provisions of this law are in derogation of the ordinary principles of private right, and as such must be subjected to a strict construction." It is clear that the President must prescribe the fee and designate a service as "*official*" before it has been performed, or not at all. If no *rate* has been fixed by the President, the *rate* is within the discretion of the consul, and, of course, the fee belongs to him, as the act had not been designated as "*official*." Any question that may arise between the consul and the Government as to their respective rights to the fees must be settled by the accounting officers and the Courts. Neither the President nor the State Department has any jurisdiction to determine it.

The Statute being strictly construed, nothing will be included by implication or intendment. Hence, no *judicial* authority will be inferred from the grant of legislative authority, nor power to regulate the rates of *un*-official fees.

The legislative power given the President by Section 1,745 is different in principle from the authority conferred by Section 1,752, R. S., to prescribe regulations, "not inconsistent with law," for the government of the consular corps. The latter is a mere executive duty and would be implied as a right inherent in the Executive prerogative, if it had not been expressly conferred by law.

The President cannot delegate the legislative power granted by Section 1745, R. S. It is analogous in principle to the grant of legislative power to a municipal body to enact by-laws and ordinances. A tariff of fees prescribed by the President is nothing but a Presidential ordinance. Such grants of power are always strictly construed. "So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body

cannot refer the exercise of the power to the discretion and judgment of its subordinates."

Cooley, Constitutional Limitations, 249 (5th Ed.)

"The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable." (Marshall, Ch. J., in *Clarke* vs. *Washington*, 12 Wheat., 40.) Sedgwick on Constitutional and Statutory law, p. 330, says: "In cases of authority of this kind, where personal trust or confidence is reposed in the agent—where his discretion is to be exercised—the authority is purely personal, and cannot be delegated." In *Lyon* vs. *Jerome*, 26 Wend., 494, Verplanck, Senator, said: "In *all* cases of delegated authority, where the delegation indicates any personal trust or confidence reposed in the agent, especially where such personal trust is implied by making the exercise and application of the power subject to the *judgment* and discretion of the agent or attorney, the general rule is that these are *purely personal* authorities, incapable of being delegated to another, unless a special power of substitution be added. * * * How much more strongly, then, must the reason and policy of the rule apply to the delegation of authority by the State, to its high public officers, made with the solemnity of a legislative act." The case of *Runkle* vs. *United States*, 122 U. S., 557, is an authority in point. The Secretary of War issued an order announcing the approval of the sentence of a court-martial, dismissing an officer from the army. It failed to show the personal approval of the President. The act of the Secretary of war, as was shown, was in accord with many precedents of his office. The Supreme Court held that the order of the Secretary was a nullity. That the power of approval with which the President in such a case is invested is *judicial*, and cannot be exercised through a deputy. Waite, Ch. J., delivering the opinion of the court, said: "There can be no doubt that the President, in the exercise of his *executive* power under the constitution, may act through the head of the appropriate executive department. * * * * * Here, however, the action required by the President is *judicial* in its character, and not *administrative*. As Commander-in-Chief of the army, he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide *personally*, whether they ought to be carried into effect. Such a

power he cannot delegate. His *personal judgment* is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. * * * Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be fixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively, that it is the result of the judgment of the President himself, and that it is not a mere departmental order, which might, or might not, have attracted his personal attention. The fact that the order was his own should not be left to inference only." This language of the Court applies equally to a *legislative*, or a judicial power, with which the President may be invested. The Constitution makes him a part of the law-making power in approving or disapproving bills passed by Congress. He could not exercise this personal power through a deputy. The performance of mere administrative duties the President can delegate to the executive departments, and their acts are presumptively his. He can no more assign to a subordinate the personal legislative authority to prescribe consular fees and "to designate what shall be regarded as *official* services," than he could the right to approve the sentence of a court-martial, or to disapprove a bill passed by Congress.

As the Supreme Court said in Runkle's case, *supra*, "the fact that the order was his own should not be left to inference only."

The tariffs of consular fees have always been personally promulgated by the President. Take for example the Regulations of 1881.

"EXECUTIVE MANSION,

"Washington, May 1st, 1881.

"In accordance with the provisions of law, the following revised "regulations and instructions, including a *tariff of fees* to be charged "for *official* services, are hereby prescribed for the information and "government of consular officers of the United States.

"(Signed) JAMES A. GARFIELD."

Paragraph 496, Reg. 1881: "The following is the revised tariff of *official* fees, prescribed by order of the *President*, and to be observed by all consular officers." This is the only paragraph in the Regulations purporting to be the personal order of the President.

Section 1,745, R. S., only gives the President authority to prescribe the *rates* of a tariff of *official* fees. The Regulations of 1863 say:

"The following is the rate or tariff prescribed by the President for services herein specified, which shall be regarded as official services," etc. This is substantially the same as the corresponding paragraph prescribing the tariff of fees in Reg. 1881 (par. 496) and in the new Regulations issued in 1888. The *rates* of fees for *un*-official services are left to the discretion of the consul—where the law left it. If the statute had given the President authority to fix the rates of *un*-official or personal fees, then it would have been his duty to have prescribed them. Paragraph 472, Regulations 1881, says: "The general rule in regard to such services is, that a consular officer is entitled to the same fee that would be charged if the services had been performed by a notary, attorney or other agent of the foreign country." In reference to notarial or unofficial services, paragraph 477 says: "It is to be understood that in such cases the consul or officer does not act in his quality of an agent of the Federal Government, but simply as a citizen of the United States, whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual. He should make himself as useful as he can to his fellow-citizens, without giving offense to the government which gives him his *exequatur*."

Section 1,750 R. S. authorizes consuls to perform notarial acts, to be certified under their seal of office The Regulations of 1874 absurdly instructed consuls (paragraph 308) that they must use a *notarial* seal for such work. Many consuls supposed there was some magic in a seal that could transmute all acts certified by it into *un*-official work. A consul not being a notary had no right to use a notary's seal.

Paragraph 473, Regulations 1881, says: "The notarial seal prescribed in the Consular Regulations of 1874, to be used for notarial acts, is no longer required, the consular seal being used in its stead." There had been no change in the *law;* the Regulations were changed so as to conform to it.

In reference to unofficial work, Regulations 1874, paragraph 476, says: "This function is regarded as outside of the *regular duties and responsibility of a consular officer*."

The Regulations of 1874 (which were in force when the claimant took charge of the consulate, February 4th, 1879) took a new departure from the practice that had prevailed of only prescribing rates for official services, and assumed, or rather usurped, the right to prescribe the rates of both official and *un*-official fees. Paragraph 330 says: "The following is the revised tariff of fees, prescribed by order of the Presi-

dent, and to be observed by all consuls." The word "official" is not in the paragraph. The table includes both classes of fees.

Paragraph 321 undertakes to furnish a test by which to discriminate them. No one has ever been able to extract an intelligible meaning from it. It reads thus: All acts are to be regarded as '*official services*' where the consul is required to use his seal and title officially or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States." Of course, if all the fees in the table had been "*official*," this paragraph would have been superfluous. It is not in the Regulations of 1881. It has never been explained how a consul could use his seal and title and not use them "*officially*." So far as the *form* of authentication is concerned, it is just the same for notarial acts as for what are termed *official* services. The paragraph is evidently based on the idea that a consul must certify notarial or unofficial work under a notarial seal. The definition being founded on a false theory is itself defective and really defines nothing. Like reasoning in a circle, it ends where it begins, for after telling a consul that the fee is official when he uses his seal and title "*officially*," it fails to tell consuls when they use the same "*officially*" and when they do not. It would puzzle Aristotle to find out. The meaning is left to conjecture.

A tariff of consular fees is nothing but a Presidential ordinance, issued by statutory authority. (Section 1,745, R. S.) Its validity must be tested by the identical principles that govern municipal by-laws and ordinances. It should be a clear, plain, intelligible rule.

An ordinance to be valid must be *certain*—its meaning must not be left to be guessed at; especially where penal consequences may result from the adoption of the wrong one. Section 1,724, R. S., makes a consul liable on his bond, not only for all official fees he actually collects, but for all that it is his duty to collect (paragraph 483, Regulation 1881); and Section 1,734 makes him guilty of embezzlement for failure to account for them. It ought, therefore, to be a clear, rational rule; not a snare, or a pitfall. "Municipal by-law must also be reasonable. Whenever they appear not to be so, the Court must, as a matter of law, declare them void. A by-law to be reasonable must be *certain*."

Cooley, Constitutional Limitations, p. 243 (top.)
Dillon on Municipal Corporations, § § 319, 320, 322.

In the note to *Robinson* vs. *Mayor of Franklin*, 34 American Decisions, p. 635, it is said: "To be reasonable, a by-law should be *certain*; certain in its definition of the offense, and certain in the penalty inflicted by it. Thus a by-law imposing a penalty for driving any 'drove,' or 'droves' of horned cattle through the streets, was held void, for vagueness and uncertainty in the thing forbidden."

McCorville vs. Jersey City, 39 N. J. L 42.

The Court said that the ordinance did not state how many cattle constituted a *drove*. "It is impossible," says Dwarris (p. 652), "to dissent from the doctrine of Lord Coke, that Acts of Parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters."

Paragraph 321, Regulation 1,874, defining official fees, is liable to the charge of having been "*darkly penned.*" It is the duty of the Government to define clearly its rights, and those of its officers. In a case of doubt and uncertainty, the statute will be beneficially construed in favor of the officer. The Regulations of 1874 are unreasonable in respect to fees, because they are uncertain. The ambiguous ordinance is incapable of construction, and void; it is not a proper execution of his power by the President. "They (ordinances) must, on pain of invalidity, be *reasonable*, and not in excess of the statutory power authorizing them, or repugnant to that statute or the general principles of law."

Endlich on Statutes, Section 352.

The tariff regulation of 1874, prescribed by the President, and so-called definition of official services (¶ 321) is invalid, (1) for uncertainty; (2) it is in excess of the power given by Section 1,745, R. S., in attempting to fix the rates of *un*-official or private fees. An insensible statute is inoperative. There were no *official* fees under the Regulations of 1874, because there was no proper designation of *official* services. The official are so blended with private fees that they cannot be distinguished. On the familiar principle of *confusio bonorom*, the Government, being responsible for the confusion, forfeits its rights. The case stands just as if the President had made no attempt to exercise his power. No service has been designated as *official* (in the sense of Section 1,745) by statute—that has been left to the discretion of the President.

Section 2,851 provides the *fee* for certifying an invoice; it only fixes the rate, and leaves to the discretion of the President to say whether the service shall be *official* or not. The uncertainty about consular fees in Regulations of 1874, paragraph 321, caused paragraphs 489 and 496 to be substituted for it in the Regulations of 1881. It is the *old* rule, and is intelligible. All official fees are in the table, but no others.

The uncertainty of the Regulations of 1874, as to fees, is shown by the opposite construction that was put upon them at the State and Treasury Departments. According to the interpretation of the State Department, more than half the fees in the table were *un*-official; whereas, the First Comptroller decided that whenever a consul's acts were authenticated by his seal and title, the act was *official*. If the First Comptroller was right, all fees were to be turned into the Treasury, as all a consul's acts must be certified under his seal, to be valid. (Section 1,750, R. S.; paragraph 473, Regulations 1881.) The Comptroller's decision made the Consular Regulations a fraud and a snare, in creating delusive hopes.

In accordance with the doctrine of *confusio bonorom*, the Government having so blended and intermixed official with private fees that they are indistinguishable, loses all its rights in the mass. It cannot take advantage of its own wrong in not having done its duty and drawn a clear line of demarcation. The consul, as the injured party, is entitled to the whole. It is a fraud in a party to mix his goods with another's so that they cannot be identified. "If A willfully intermix his corn or hay with that of B, or cast his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. It is for the party guilty of the fraud to distinguish his own property satisfactorily, or lose it."

2 Kent. Com., p. 364 (12th ed.)
The Idaho, 3 Otto, 575.

As a precaution against the abuse of his power, the President is required annually to report the tariff of fees to Congress (section 1,745); section 1,731, R. S., directs consuls to keep it posted conspicuously in their offices. Section 1,718 authorizes a master to demand of a consul to perform any services for which a fee is prescribed in the official list. Section 4,207 directs a collector when granting a clearance to a vessel for a foreign voyage to attach to it a schedule of

consular fees. The publication of the list of official fees enables the consul and those who deal with him to know their rights, by having an established rule to guide them. The object of these requirements is to secure permanent, consistent and uniform rules. The President has the right "to adapt the same by such differences as may be necessary or proper to each legation, consulate or commercial agency." But this power is to be exercised, not capriciously, but according to a and sound discretion. He might classify consulates in different countries and prescribe different rates for them : *e. g.*, for consulates in China there might be higher rates than in Europe, as the salaries of consuls in China are generally higher than in Europe. But it must be done on some rational principle; otherwise, the ordinance is unreasonable and void. It would be unreasonable if the fees were so excessive as to amount to confiscation of vessels; or, if there should be different rates for each port in China; or, if he should designate acts as official services at Hong-Kong which were *un*-official at Shanghai. This would be an abuse of power.

"Though the act done was ostensibly in execution of the statutory power, and within its letter, it would, nevertheless, be held not to come within the power if done otherwise than honestly and in the spirit of the enactment. * * * When a discretion is thus conferred upon an officer it must be exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself; that is, within the limits and for the objects intended by the legislature. Now, it was long ago settled that the power given by the 43 Eliz. to the overseers of parishes to raise a poor rate by taxation of the parishioners in such competent sums as they thought fit, did not authorize an arbitrary rate on each parishioner, but required that the rates should be equal and proportionate to the means of the contributors. * * * And it must be exercised in a reasonable manner."

Endlich on Statutes, Sections 146–148.

As a fact, all the different tariffs of fees have been uniform throughout the world.

Consuls are required to keep a list of Treasury fees. Each is credited separately to the Government, and the particular service for which it is paid described. A transcript of this record is sent quarterly to the Fifth Auditor. This is done so that the accounting officers can

compare a consul's accounts with the tariff promulgated by the President and see that the rates correspond. This could not be done unless there were general, uniform rates. (Paragraph 538, Regulations of 1881.)

The President, under his statutory authority, has no right to make invidious discriminations among consuls. "Ordinances must be reasonable; they must not be oppressive; they must be fair, impartial and general"

Dillon on Municipal Corporations, Sections 319, 320, 322.

A statute or ordinance, to be reasonable and valid, must be general in its operation. Under the head of "Unequal and Partial Legislation," in Cooley on Constitutional Limitations, page 484 (top), it is said: "Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

A consul has the right to be governed by "the law of the land." In his argument in the Dartmouth College case Mr. Webster said: "Let this question be answered by Blackstone: 'And first it (*i. e.* law) is a *rule;* not a transient, sudden *order* from a superior to or concerning a particular person, but something *permanent, uniform* and universal.'"

An order, even from the President, making the consul at Hong-Kong an exception to the general rule in regard to fees, and depriving him of perquisites which others were allowed to retain, would be inoperative and void for a still stronger reason. Such an order coming from him could have no legal effect on the rights of the consul. He might classify the consulates; then, "if the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply," etc.

Cooley on Constitutional Limitations, p. 483.

In the exercise of his authority, fairness and impartiality must be the rule. It was never intended to invest the President or State De-

partment with mere personal and despotic authority over consuls. The mere will of the President or State Department is not "the law of the land."

In the case of *Wally's Heirs* vs. *Kennedy*, 2 Yer., 554, S. C. 24, American Dec., 511, the Supreme Court of Tennessee had under consideration the validity of a statute that was partial in its operation. Catron, J, said: "What is 'the law of the land?' This Court, on two occasions and upon the most mature consideration, has declared the clause 'the law of the land' means a general, public law equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule that governs every other member of the body politic or land, under similar circumstances, and every partial or private law which directly proposes to affect or destroy individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporate bodies would be governed by one law, the mass of the community and those who made the law, by another," etc.

Bank vs. *Cooper*, 24 Am. Dec., 517.

In the case of The Laundry Ordinance, 7 Sawyer, 530, which was directed against the Chinese in San Francisco, Mr. Justice Field said: "The power of legislation vested in them [the Board of Supervisors] is a public trust, which can be executed only in consonance with the general purposes of the municipality and in subordination to the general laws and policy of the State. Their ordinances must be reasonable; that is, not oppressive, nor unequal nor unjust in their operation, or they will not be upheld."

The ordinance was condemned as invalid. The decision applies to an ordinance or regulation made by the President in pursuance of legislative powers given him.

Baltimore vs. *Radecke*, 49 Md., 217.
S. C., 33 Am. Rep., 239

In the matter of Frazie, 63 Mich, 396, S. C., 6 Am. State Rep., 310, an ordinance designed to prevent the "Salvation Army" from parading the streets, was adjudged unreasonable and invalid "because it leaves the power of permitting or restraining processions—in this

case a Salvation Army procession—and their courses to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially." The Court said: "All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. * * * The law must be impartial and general, or it is no law."

Waite vs. *Local Board*, L. R. 12, 3 Q., 13, 5.

In the case of *U. S.* vs. *Cruikshank*, 92 U. S., 555, Waite, Ch. J., said: "The equality of the rights of a citizen is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if in its power."

The subject of unjust and discriminating ordinances was considered by the Supreme Court in the case of *Yick Wo* vs. *Hopkins*, 118 U. S., 356. An ordinance of the city of San Francisco made it unlawful to establish or maintain a laundry in the city without having obtained the consent of the Board of Supervisors. It was general and impartial on its face, but in its administration was applied so as to operate harshly against Chinese. The Court held the ordinance invalid on common law principles, for being unreasonable, in clothing the Board with arbitrary powers, and on constitutional grounds in denying to a class "the equal protection of the laws.'" Mr. Justice Matthews, delivering the opinion of the Court, said: "The powers given to them [Supervisors] is not confided to their discretion, in the legal sense of that term, but is granted to *their mere will*. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The State Department claimed just such absolute authority over the fees and emoluments of consuls. The fact is, the statute conferred on the Department no power whatever. The Court again says: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely arbitrary power. * * * The same principle has been more fully extended to the *quasi*-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine that every by-law

must be reasonable, not inconsistent with the charter of the incorporation nor with the general principles of the common law of the land, particularly those having relations to the liberty of the subject or the rights of property."

Dillon on Municipal Corporations, Sections 319, 320, 322.
Ex parte Frank, 52 Cal., 606.

The President is authorized to prescribe the *rates* of consular fees, and to designate what shall be regarded as *official* services, besides such as are expressly declared by law, "*in the business*" of the several legations,—consulates. (§ 1745 R. S.)

Clearly this does not mean that the President shall have autocratic power to designate *every* act of a consul as *official* and to prescribe a fee for it. It clearly means that class of acts which the law *requires* a consul to perform, and which he must attest by his seal and signature. As a fact, no acts have been declared as *official* by law; only *one* fee (Section 2,851) has been fixed by statute, but it was not designated as "*official.*" If the President had not included it in the official table (Item 36, Regulations 1880) it would have been *un*-official. The discretion of the President to designate certain acts as "*official*" and to discriminate between what shall, and what shall not be required as "official," is limited to that class of acts which belong legitimately to "*the business*" of the consulate. Any other construction would invest the President with the power. In the case of U. S. *vs.* Badeau (late consul-general at London,) (33 Federal Reporter, 572), Section 1,745 R. S. was construed by the U. S. District Court, Southern District New York, as meaning acts that are "within the scope of the '*business*' that belong to the legation *as business*; * * business that is governed by United States statutes and is within the jurisdiction of the United States; subjects of interest to the United States, and about which they are legislating. The next section says that all fees collected by diplomatic and consular officers '*for* and *in behalf of the United States*,' shall be collected in the coin of the United States. This is apparently a recognition that there may be fees that are not collected in behalf of the United States. Section 1750 is a general authority to consuls to perform any notarial act which any notary public is required or authorized by law to do within the United States, prescribing what shall be the effect of it. The construction given to such statutes, so far as I am informed, and which the Court regards certainly

+ S. C. 31. Fed: Reporter 697

as the correct one, is that the statutes relate to such acts as are within the scope of the jurisdiction of the Federal Government. By this general language, acts are not intended which belong to a wholly different sphere.

"For these reasons my judgment is that not only these three sections of the statute, but the regulations themselves issued by the President in conformity with Section 1,745, are all to be construed as refering to those subjects which belong to the jurisdiction,—to "*the business*," to the interests, of the United States In other words they concern Federal relations, and not relations which are exclusively individual, or State, and which have no reference to the United States business, or to United States interests. This construction seems to me to be not only in harmony with the settled construction of the United States statutes in limiting them to the subjects of Federal jurisdiction, but also to be entirely just and beneficial. The consul's acts in these matters are wholly voluntary; there is no obligation upon him to do these acts, if they are such as I speak of. And if he is under no obligation whatever to do them, if they are entirely outside of the consular business, the government has no interest in the question whether the acts are done or undone. What equity, therefore, is there in the government demanding the fees for his labor? Congress might, of course, prohibit his doing such acts; it might prohibit the use of the seal as evidence that he had done them; but it is for Congress, and not the Court, to say how far he may be permitted to use the seal It is for the convenience of American citizens, possibly of others, that services of this kind should be done to some extent by the consul, or by some one in his position. He is under no obligation to do them; and if he is not to be paid anything for doing them—if his fees are to be returned to the government, that wholly discourages the doing of such acts, and would naturally lead to their discontinuance and to the inconvenience of our citizens to that extent. Whenever Congress makes it the duty of the consul to do certain acts, then those acts become official by virtue of that obligation; but so long as it is left entirely voluntary, I see no reason in the claim that the fees for what is done voluntarily, at some trouble and cost to the officer, outside of the business and interests of the government, should be returned as official fees belonging to the government." All the fees claimed in the case at bar were for acts *voluntarily* done by the consul and which he might have declined to do, and which were "outside of the business and in-

terests of the government," and which no law of the United States required him to perform.

The language of the Court is too broad in saying that "whenever Congress make it the duty of a consul to do certain acts, then those acts become *official* by virtue of that obligation." They are not *official* in the restricted sense of the statute, unless (1) a fee has either been prescribed by the statute or the President; (2) it must have been expressly designated as *official*. The Coolie Act of February 19th, 1862, required consuls to perform certain duties in relation to American vessels, but prescribed no fee. No fee was ever prescribed for executing the law until September 1st, 1881 (Cons. Reg., 1881.) There was no more reason for not exacting compensation for this work, than anything else a consul did. It was then in the consul's discretion to fix the rates of such fees, as the Government had not done it; or he might have done the work and charged nothing. Now, Section 1,724, makes him accountable for all *official* fees collected, and all he has failed to collect. Suppose the Government had sued a consul for such fees collected prior to September 1st, 1881, when no rule had been prescribed to govern his discretion, what would be the measure of the recovery? Could the Government recover on a *quantum meruit*, and make the consul responsible for its own default? Then if the consul were civilly, he would also be criminally liable for not having accounted for the fees. Or suppose he did the work and charged nothing? Such a doctrine is not to be tolerated in a free country. Section 1,707, R. S,, gives a consul the right to receive protests from masters and others, who are citizens of the United States, copies of which, duly authenticated under his seal, are made evidence in U. S. Courts. Section 1,735 makes a consul liable on his bond to any person when damaged by "his neglect to perform seasonably any duty imposed by law." Noting and extending marine protests for masters of American vessels, is one of the most useful functions of a consul. The original is preserved in the protest-book of the consulate; the statute makes the copies evidence when duly certified. To make the protest available for actual use, the master must get certified copies. It is clearly as much the duty of the consul to make and certify copies, as to extend the original protest. The statute prescribes no fee for doing it. If the fees for the copies belonged by law to the Government, the President would have no right to give them to the consul. The Regulations of 1881 pre-

scribe the fee for *extending* the protest as official, but say that, "when parties have a right to call for *copies*, consular officers must make them at this rate. The fee for the copies is not an official fee to be accounted for. (See note, page 172, and Item 66, Tariff.)

Extending the protest and making copies are all a part of the legitimate *business* of the consulate. The President elected to designate a portion of it as *official*, and to leave the other part as *un*-official. Sections 4,517, 4,518, R. S., require masters to ship their crews before consuls, and make it penal not to do so. When the Regulations of 1874 were in force, there was always in the annual consular appropriation bill an allowance to pay expenses of shipping seamen at London, Liverpool and Havre, with a proviso that the fees for shipping seamen at those ports should be paid to the Treasury. Shipping sailors is a duty required of a consul by law. If that made the fee for it "official," then the proviso in the appropriation bill was superfluous. By inserting the proviso, Congress designated the fees as *official*, and recognized the right of the President, at other places to make fees *official* or not, according to a sound discretion. The President, then, in *the business* of the consulates, such as shipping and discharging sailors, certifying invoices, extending and making copies of marine protests, can discriminate and designate only a part as *official business*. If he prescribes fees, and designates them as official, for shipping sailors, they must go to the Treasury. If he fails to do so, the consul must still do the work; for doing it masters must pay what he may charge them. The fees belong to him. If a consul takes a deposition under a Commission from a State or foreign Court, the President has no authority to fix his compensation, for this is outside of the *business* of the consulate. * * * (Badeau's case.) If he were to refuse to do the work, he could not be held liable by the government for failure to collect the fee, even if the President should have extended his authority and prescribed one. When the President prescribes a fee for an act it is equivalent to a declaration by him that the law requires or makes it necessary to be done. Suppose the President had prescribed a fee for examining Chinese coming to the United States on foreign vessels. It would have been unlawful. The mere will of the President could not change the law and make a thing necessary which the statute did not.

It has always been the policy of the Government to allow salaried consuls to retain a certain amount of fees. In Pickett's case, who

was a salaried consul at Vera Cruz, and claimed compensation *from the Government* for taking depositions *in its behalf* in some cases in admiralty, Judge Black held that he was entitled to it, on the ground that, "the taking of the depositions was not the duty of the consul *as consul.*" †

9 Op. of Atty. Genls., p. 496.
Cushing, 7 Op. of Atty. Genls., p. 242.
Stanberry, 12 Op. of Atty. Genls., p. 1.

Transit Certificates, Finding 9, p. 4, Record.

The Court of Claims allowed the fees claimed "for the certificates of shipment of merchandise *in transit* through the United States to other countries." Such invoices, or rather the consular certificates annexed to them, differ in form and substance from the declaration of the shipper, and the certificate of the consul prescribed by the statute and regulations to accompany imports of dutiable goods intended for consumption in the United States. (Forms 138 and 140, Reg. 1874.) Goods *in transit* pay no duty. It would be an idle form to require foreign merchants to procure a consular certificate of the cost or market value of goods passing in bulk through the United States (and in sealed cars, if they are transported overland,) in which the United States has no interest. They are carried in bond through the country in accordance with regulations prescribed by the Secretary of the Treasury, with which a consul has nothing to do. The form of *manifest* is given Reg. 1874, Form 146 (Par. 493). The steamship lines running between Hong-Kong and San Francisco carry large quantities of merchandise to be transhipped to Canada, Mexico, Central and South America. Goods *in transit* are not considered importations within the meaning of the revenue laws. Paragraph 640, Reg. 1881, says, that consular invoices are not required for them. If merchants desire such certificates it is perfectly lawful for a consul to give them and fix his own price for his work. In giving the certificate the consul is discharging no duty he owes the Government. It is not a part of "*the business*" of consulates which the President has designated or could designate as "*official*". The opinion of the Court in Badeau's case, *supra*, applies to a transaction of this kind. The Court has found (14) that the State Department instructed the claimant, August 26, 1879, "that the fees for acts which the consul is empowered but not required by law to perform, and which relate only

† Department usage —
U.S. v. Moore — 95 U.S. 763
U.S. v. Pugh — 99 U.S. 269
U.S. v. Macdonnel — 7 Peters — 14

to private transactions, are *unofficial*." The consul was under no legal obligation to do such work. The fee prescribed by statute (Sec. 2,851, R. S.) is for certifying an invoice for *dutiable* goods. The President has designated this as an *official* fee. Attention is invited to the following circular:

"TREASURY DEPARTMANT,
"September 14, 1889.

"To Collectors of Customs:

"Articles 854 and 908 of the regulations are amended so that *con-* " *sular certificates will not be required for invoices for goods passing* " *through the territory of the United States* from one foreign port to " another, provided that the manifest, invoice or bill of lading shall " show such foreign destination, and shall contain a general description " of the goods in each package, with their aggregate value.

"(Signed) WILLIAM WINDOM,
"Secretary."

Neither the Regulations of 1874 or 1881 prescribed any fee for certifying documents for goods *in transit*; and as has been said there was no authority to do so. It was a purely voluntary work of the consul for the accommodation of private parties. The Court of Claims says, in reference to such invoices (p. 12): "For the purpose of avoiding delay and annoyance the shipper of goods through the United States procured from the consul what is called "*transit invoices*." They are not the invoices referred to in the sections of the statute above quoted, but such as accompanied goods *in transit* through the United States. The law did not require the consul to issue such certificates, and hence no provision was made for them either in the regulations of 1874 or 1881. Nor do the regulations of the Treasury Department require the consuls to perform any duty in relation to such goods."

Fees for Invoices of Free Goods, Finding 11, p. 5.

The fees for certifying invoices for *free* goods imported into the United States were allowed by the Court. They are claimed on the same ground that the fees for transit invoices are, viz., that the consul rendered a voluntary service in certifying them, as no law requires such a document for *free* goods and the Government has no interest in them. The invoice required by law is only for *dutiable* goods. Sec. 2,851, R. S., prescribes the fee for it; this fee has been put in the official tariff by the President. Sec. 2,854

requires a declaration by the shipper before the consul of the *cost* or *market value* of goods subject to *ad valorem* duty and of their *quantity* when subject to specific duty. The object is to procure the evidence of the foreign shipper, certified by the consul, as to the cost or value of goods as a guide to appraisers in assessing the duty on them. If the goods pay no duty the document is useless and an unnecessary burden on commerce, as the consul's fee is always charged on the face of the invoice to the consignee as a part of the cost of the goods. The Government has no interest in imports that pay no duty. The consular invoice is only designed to protect the revenue in the valuation of goods. Their value is immaterial if they pay no duty. Such invoices are not neccessary to show whether goods are *free* or dutiable. Free goods must pass through inspection at the custom-house just as if they paid duty. The law also requires the manifest of an importing vessel and the bill of lading to be deposited with the Collector. That invoices for *free* goods are useless is shown by the following joint circular of the State and Treasury Departments. It shows the tenacity with which the departments cling to any custom, no matter how absurd and unlawful, provided there is money in it.

"DEPARTMENT OF STATE,
"Washington, September 7, 1885.

"*Gentlemen*—Complaint has been made to the Department that consular officers in some places require declarations to invoice of goods exported to the United States to be in all cases verified under oath. The Revised Statutes provide (sections 2,843, 2,845) that no merchandise subject to *ad valorem* duty, belonging to a person not residing at the time in the United States, shall be admitted to entry unless the invoice is verified by the oath of the owner or one of the owners. In no other case is verification under oath made essential. But Section 2,862 provides as follows: 'All consular officers are hereby authorized to require, before certifying any invoice under the provisions of the preceding sections, satisfactory evidence, either by the oath of the person presenting such invoice, or otherwise, that such invoices are correct and true. In the exercise of the discretion hereby given, the consular officers shall be governed by such general or special regulations or instructions as may from time to time be established or given by the Secretary of State.' * * * There are large classes of cases in which the administration of an oath serves no good

purpose in protecting the revenues of the Government. Thus, for goods on the *free* list an oath is plainly unnecessary. * * * Only where goods are subject to *ad valorem* duty is the oath of the owner deemed of any special value, etc. * * * (1.) No oath shall hereafter be required for the verification of invoices of goods on the free list or subject to specific duty *only*. (2.) Invoices of merchandise subject to *ad valorem* duty, belonging to a person resident at the time in the United States, may be verified under oath when the consul or officer to whom it is produced has reason to suspect the correctness of the invoice, and not otherwise. I am, etc., etc.

(Signed) "T. F. BAYARD.

"To the consular officers, etc."

This circular was adopted by the Treasury Department September 13th, 1888.

So, according to the late Secretary of State, consuls must not have invoices for free goods verified. either by the oath of the shipper or o herwise, as such an invoice "serves no good purpose in protecting the revenues of the Government ;" as there is no revenue to protect. If it is immaterial whether a document is true or false, why, then, require it? Invoices for *free* goods are not included in the letter or the reason of the statute ; they are. in fact, excluded by both. The statute prescribes what are the essentials of an invoice for goods paying both *ad valorem* and specific duties; it is silent as to *free* goods.

In certifying such a document, to what does the consul certify, as the State Department forbids him to inquire into its integrity? He is commanded not to require evidence of its truth.

Section 2,857 says that when a copy of the consular invoice fails to reach the collector at the port of entry, he may admit the merchandise to entry "on the execution of a bond in *double* the amount of the *duty* apparently *due*," to produce a triplicate invoice in a stipulated time; and "the *duty* shall not be finally liquidated until such triplicate shall have been received." Suppose a cargo of tea arrives without a consular invoice. The collector has no authority to take a bond from the consignee in such a case, for the penalty must be "in double the amount of *duty* apparently due." The tea is free ; no duty is really or apparently due ; the bond can contain no penalty. A bond without a penalty is no bond at all. If he exacts a bond with an arbitrary sum as a penalty it is void.

U. S. vs. *Tingey*, 5 Peters, 114.
U. S. vs. *Rice*, 4 Wheat., 246.

Section 2,859 admits to entry goods under $100 in value without a consular invoice, where the collector "is satisfied the importation is in good faith and without purpose of evading revenue laws," showing that a consular invoice is simply required as the evidence of the value of goods that pay duty. There can be no fraud where no revenue is to be collected.

Section 2,841 provides that when goods are entered by invoice the consignee must swear that "nothing has been concealed, or suppressed, whreby the United States may be defrauded of any part of the *duty* lawfully due on said goods," &c. Section 5,443 imposes a penalty for concealing or destroying any invoice "relating to any merchandise liable to duty." Sections 2,843, 2,845, 2,846, 2,847, 2,848, 2,849, all refer to goods subject to *ad valorem* duty. There are no general words in the statute that might include invoices for *free* goods in its letter. If there were, still, invoices for free goods would be excluded by the reason of it. "The reason of the law," said Lord Coke, "is the life of the law." Goods in transit, and free goods, are on the same footing in respect to invoices; they pay no duty; the maxim is, that where the reason is the same the rule should be the same. The consul is performing no duty to the government in certifying invoices for free goods. If a collector unlawfully exacts them, it is not the fault of the consul. Merchants have their legal remedy against him. Certifying invoices for dutiable imports is a part of "*the business*" of a consulate; certifying them for *free* goods is not.

The President has no right to prescribe any such duty to a consul, and has not. The Court of Claims on this subject says (p. 14), "The purpose in this particular is evidently to so guard the shipment and transportation of goods that the revenue of the United States shall be protected against the importation of goods having a duty imposed on them as a tariff, either *ad valorem*, or specific, without the payment of that duty. The invoices provided by law have in view that direct purpose, and the different requirements of Section 2,854 clearly identify the character of invoices contemplated in the preceding sections of the law. The certificate to an invoice of goods, free of duty, so far as the requirement of the statute goes, is not within the spirit and purpose of the law, and must be held as a non-official paper

The question of the right of a collector to exact consular invoices for free goods was decided adversely to the collector, by Judge Sawyer in the United States Circuit Court for California (December 1889), in the case of Siegfried & Brandenstein *vs.* Phelps, Collector.

The Court said: "This is a suit to recover the value of a certain "shipment of tea at a port in Japan to the port of San Francisco, "arising out of a refusal of the collector to allow the tea to be "delivered to the consignees, without their presenting to him a "consular invoice having endorsed thereon the declaration required "to be made before the consul at the port of shipment and the con-"sul's certificate required by sections 2,854 and following of the Re-"vised Statutes, or giving the bond to produce one at some future "day, in pursuance of the provisions of section 2,857.

"The plaintiffs insist, that the merchandise being tea, which pays "no duty, does not fall within the provisions of the statute, which is "intended to apply to dutiable goods only; and it appears to me that "this position is correct. There is nothing at all said about non-"dutiable goods; and the provisions are adapted only to dutiable "goods, subject to either *ad valorem* or *specific* duties. The declara-"tion provided for must state that the invoice 'contains, if the mer-"'chandise mentioned therein *is subject to ad valorem duty* and was "'obtained by purchase, a true and full statement of the time when "'and place where the same was purchased, and the *actual cost thereof,* "'*and of all charges thereon;* * * * and when obtained in any "'other manner than by purchase, *the actual market value thereof at* "'*the time* and place when and where the same was procured or man-"'ufactured; and if *subject to specific duty, the actual quantity thereof.*' "This requirement was manifestly intended to enable the collector to "determine the amount of duties to be collected, and a form of "declaration is prescribed by the statute, adapted to each mode of "assessing duties, so that the collector can ascertain the value of the "goods subject to *ad valorem* and the quantity of those subject to "*specific* duties. But neither form is adapted to non-dutiable goods, "and there is no occasion to know, for the purposes of the revenue, "either the value or quantity. Non dutiable goods are not mentioned, "and no declaration is provided adapted to that class of goods. "Which of the forms should be adopted, when neither is prescribed "and neither would fit the subject matter? So the bond provided for "in section 2,857 is to be '*double the amount of duty apparently due,*

" 'conditioned for the *payment of the duty which shall be found to be* " '*actually due thereon.*' As the goods show for themselves what " they are and that they pay no duty, whatever the conditions of the " bond, they no more fit the case than do the matters prescribed in " the statement to be made before the consul in the case of dutiable " goods. Evidently the statute mentioned all the cases to which this " declaration, certificate and bond were intended to be made appli- " cable.

" To extend the requirements by loose construction or inference to " goods that pay no duty would be to impose, in the aggregate, large " burdens upon commerce, without any corresponding benefit.

" I do not think the Secretary of the Treasury is authorized by the " statute to put any burdens upon commerce in addition to those imposed " by the statute itself. He is authorized to make regulations 'not in- " consistent with law'—to regulate the imposition and enforcement of " the burdens, provided for by law, but not to impose others. Burdens " imposed upon commerce in addition to those imposed by statute " would be 'inconsistent with law' and unauthorized. See *Balfour* vs. " *Sullivan*, 8 Saw., 649, and cases cited; *Merritt* vs. *Welsh*, 104 " U. S., 695 and 700; *Morrill* vs. *Jones*, 106 U. S., 466.

" The Court of Claims, in *Mosby* vs. *U. S.*, took this view, when it " held that the consul was entitled to recover a considerable amount " paid into the Treasury, under protest, for fees collected for such cer- " tificates appended to invoices and statements of free goods, on the " ground that these services performed, although in form official, were " not official in fact or in law, and the United States had no concern " with them—that it was a matter entirely between the owner of the " goods, who voluntarily without requirement of law obtained and " paid for the services, and the consul, who in his own individual pri- " vate character voluntarily performed the service for the compensation " received of the owner, so paid of his own free will. The amount of " the items in that single instance, $ 2,095, will afford some indica- " tion of the extent of the burden, in the aggregate, such a regulation " by the Secretary would impose on commerce.

" In my judgment the collector unlawfully refused to deliver " the tea, and is liable.

" The demurrer to the complaint must be overruled, and it is so ordered."

Fees For Extra Copies, or Quadruplicate Invoices, Finding 10, p. 4, Disallowed the Claimant.

These were all collected under Regulations 1874 and prior to September 1st, 1881. Those collected *after* that date were refunded by the First Comptroller. He refused to refund the fees collected under Regulations 1874 because the extra copies were certified under the consul's seal, and his construction of the Regulations was that all acts were official when the consul's seal was used. Sections 2,853, 2,855, R. S., require consular invoices for dutiable imports to be in triplicate; one of the triplicates to be returned to the shipper, to be sent to the consignee in the United States for use in entering the goods at the custom-house; one of the triplicates to be retained on file in the consulate; the third copy to be sent enveloped under seal to the collector of the port where the goods are to be entered and duties paid. The statute only *requires* a consul to certify triplicates; having done that he has discharged his duty to the government. He is not prohibited from certifying any additional number of copies a merchant may desire. All the copies are numbered the same in the series; the invoice is a unit. It is immaterial to the government how many copies there are. The consul's right to certify quadruplicates, or quintuplicates, or any number of extra copies, is not expressly given by the statute, but is implied on principles of convenience. The Regulations could not confer the right, but recognize it as existing—in paragraphs 491, Regulations of 1874, and 668, Regulations of 1881. They fix a fee of $2.00 each for extra copies. This fee for extra copies, or quadruplicates, is not in the official tariff. The exigencies of trade often require merchants to get extra copies of invoices. If the invoice is a triplicate the shipper gets *one* copy for his own use, or rather to send his consignee. If he needs more copies he gets them by paying $2.00 each for them. To insure certainty in business, on account of dangers of the sea, foreign merchants send their letters, bills of exchange, and other commercial documents, by succeeding mails in duplicate. Those who buy on commission for constituents in the United States, draw bills of exchange on them, which are generally negotiated at the local banks. When a bank discounts a bill of exchange drawn against a shipment to the United States, it requires the shipper to endorse and hypothecate as security the bill of lading and consular invoice, so that the holder of the documents has a lien on and control of the cargo. When the bill is

presented to the consignee, if it is paid, the documents are surrendered to him; if the bill is dishonored, the bank takes possession and sells the cargo on its own account. If it did not have the consular invoice and bill of lading it could not get the goods from the custom-house. Now it is plain that the *extra* invoice is given to facilitate a private business transaction of the merchant, when accompanying the second bill of exchange.

The Government does not require him to certify, in its own behalf, a fourth, or fifth copy. The merchant gets two copies (one extra) for his own use, because he draws his bills in *duplicate*, and wants duplicates attached to each bill. Neither the Regulations of 1874 or 1881, put the fee for an extra copy in the tariff, or designate the service as official. The President had no right to do so. The statute only required the consul to certify a triplicate; the President could not require him to do more than the law required. Now, the paragraphs on the subject are identically the same in both regulations—paragraph 491, Regulation of 1374; Paragraph 668, Regulation of 1881; the law was the same. There was, therefore, no more reason for refunding those collected *after* September 1st, 1881, than those collected before. All stand on the same ground. The Court says: "The next charge is for certifying extra copies of (or) quadruplicate invoices. The sum paid into the Treasury, and which has not been refunded by the Comptroller, of that class of fees, amounts to the sum of $1,592. All such fees paid after the Regulations of 1881 took effect have been refunded, and are not now in controversy in this proceeding."

The extra copies were, of course, certified like the triplicates under the consular seal. The Comptroller construed paragraph 321, Regulations 1874, as meaning that for every act certified under the seal of the *consul*, the fee belonged to the Treasury. In other words, that all fees belonged to the government, and that the other paragraphs, on the subject of personal fees, amounted to nothing. His interpretation of the paragraph shows that it was senseless, unmeaning and void, on account of its ambiguity. The Court said: "The Regulations of 1874 must be held to apply to such acts as are *required by law* to be performed by the consul in the discharge of his official duty, as the consular representative of the government. If for *commercial convenience*, parties apply to the consul to perform acts not in consistent with law or a faithful discharge of duty to the United States, and he performs the acts, they are paid for by the party,

and the law does not require the consul to perform such acts in the absence of any designation by the President that such acts are *official services;* the fees so paid become the private emolument of the consul, and not the money of the United States." The *decision*, so far as it disallows the fees for extra copies of invoices, is a *non sequitur* from the opinion quoted above. If the opinion is right, the Court ought to have allowed the fees to the claimant: (1) The fee was never put in the Tariff, neither was the service ever designated as official. (2) No law required the consul to certify them. The consul certified extra copies or quadruplicates, when the statute only required him to certify *triplicates.* They were certified for *commercial convenience.*

When the law required a consul to certify a triplicate, and for accommodation of parties he certified a quadruplicate and charged $4.50 for it, he only asks that the fee of $2.00 for the *extra* copy be returned to him. It would not be called an *extra* copy if the law had required him to certify it. The Court finds (XIV, p. 5) that, "in instructions to said claimant, dated August 26, 1879, the said department instructed claimant that the fees for acts which the consul was *empowered* but not *required* by law to perform, and which relate only to private transactions, are *un*-official." Surely, then, the fees for certifying a document in quadruplicate (four parts) to assist a *foreign* merchant in discounting his drafts, when the statute only required him to certify a triplicate," are *unofficial.* It is true the documents were certified under the seal of the consulate; and so are *all un*-official or notarial documents. Otherwise they would be of no more value than if certified by a private individual. The Court said: "The tariff of fees embraced in paragraph 333 of the Consular Regulations of 1884, in item 36, prescribes a fee of $2.50 for invoices, including declarations in triplicate. (Sec. 2,851, R. S.) Nothing is said in the statement (table) of fees as to copies, but paragraph 491 prescribes a fee of $2.00. This charge is for certifying *extra* copies of (or) quadruplicate invoices, and can only be performed under the seal of the consulate. The act pertains to a duty specifically described by the laws of the United States, and upon a tender of the fee the party making application is entitled to have a certificate attached to the instrument, if it is a copy of the document, executed in triplicate. The party being entitled to the certificate it is the duty of the officer to attach his official seal upon payment of the fees. This is an official duty and the emolument becomes an official fee." In reply it may

be said, (1) that if the law had *required* the consul to sign the invoices in quadruplicate the fourth copy would not be an *extra* copy; (2) no such duty is "specifically described by the laws of the United States" There is not a word about quadruplicates or requiring a consul to certify additional copies after having certified a triplicate anywhere in the Revised Statutes. It may be a moral duty he owes to society to make himself useful, but it is not a duty imposed by law. Sections 2,853-2,855 only require a consul to certify triplicates. This was the only duty he owed to the United States; he certified the fourth copy for the accommodation of the merchant. If it had been designed to make this an official fee it would have been put in the official list. But the President has not and could not make it official. The Court of Claims evidently confounded the extra copies or quadruplicate invoices for which the consul charged $4.50, with the quadruplicates issued in special cases in accordance with the act of June 10, 1880, "for the immediate transportation of goods," and which applied only to the particular cities named in the Act. (Reg. 1881, par. 641.) In a case of this kind it is the duty of a consul to certify a quadruplicate for the shipper, and he can charge only $2.50, the same as if it had been a triplicate. There is no extra fee in such a case for a quadruplicate—none is claimed; it is only when the *law* required a triplicate and he certified a quadruplicate for accommodation that he claims the additional fee of $2.00, which he had the right to charge. When he certified a quadruplicate as a matter of official duty he charged only $2.50, and claims nothing; when he certified it for "*commercial convenience* he charged $4.50, and asks that $2.00 be returned to him. There are large shipments by the steamship lines from Hong-Kong, *via* San Francisco, to New York and interior ports.

Before the act of June 10th, 1880, the goods were examined and appraised at the custom-house at the port of first arrival. That act dispensed with examination and *appraisement* at the first port, where they are now simply entered by invoice and then delivered in bond to a common carrier for transportation to the port of final delivery. This saves delay at the first custom-house. As the goods pass *two* custom houses, the statute requires the shipper to get two copies of the invoice for his own use—one copy to send to his forwarding agent at the intermediate port, to be used in entering the goods there, and another copy to be sent to his consignee to use at the second port,

where the goods are appraised and the duties liquidated. The consul retains one of the quadruplicates in his office, and sends the other enveloped under seal to the collector of the port of final delivery.

The Act of June 10th, 1880, requiring a consul to certify quadruplicates for $2.50, applies to a very limited number of cases: *i. e.* goods coming from Hong-Kong to San Francisco to be transhipped overland to New York. The Act has nothing to do with the case, say, of goods shipped from Hong-Kong to a consignee in San Francisco. The goods would be entered and appraised, and duties paid, at San Francisco, the port of first arrival, and delivered to the consignee there. In such a case the statute requires the consul to certify a triplicate for $2.50; if he chooses, he can certify any additional number of copies and charge his own price. If he conforms to the fee prescribed by the Regulations, no one else can object to it. Nearly all the paragraphs of the Consular Regulations are mere departmental orders; but, as has been shown, a fee to be *official* must (1) have been prescribed by *the President*, and (2) the service designated as official by him. The only reference to the President in the Regulations of 1881 is paragraph 406: "The following is the revised tariff of *official* fees prescribed by *the President*," etc. (Paragraph 330, Regulations of 1874.)

Now, the fee ($2.00) for issuing an *extra* copy of an invoice is not put in the table prescribed by the President; hence, cannot be official. It is in paragraph 668, Regulations of 1881, which is identically the same at paragraph 491, Regulations of 1874: "Copies prepared by other persons for their own use will, on request, be certified on payment of two dollars." If goods are shipped to the United States to a port designated in section 1, to be forwarded to a port named in section 7 (Act June 10th, 1880), the fee for a quadruplicate is only $2.50; in all other cases $4.50. The invoice shows on its face the port or ports to which the goods are consigned.

Fees for services to foreign built vessels, Finding XI, page 5.

Fees were claimed and allowed by the Court for shipping and discharging seamen on foreign built vessels owned by American citizens and sailing under the U. S. flag. All the sections of the Revised Statutes which require consuls to perform such service for masters, refer exclusively to the registered vessels of the United States. No others

are recognized in law (Section 4,311, R. S.) The Court of Claims, in its opinion, (p. 13.) says: 'It is insisted by claimant, that while he was *empowered* to perform the services, he was not required to do so by any statute of the United States, and the performance of the service not being required by law, he has a right to all charges paid for such service. * * The duty performed in this instance was shipping and discharging seamen in a foreign-built ship, sailing on the China coast under the United States flag. The seamen were not American citizens, and did not ship from a port of the United States, so as to come within the provisions of paragraphs 129 and 130 of the Regulations of 1874."

Article 17, page 53, Regulations of 1874, and Article 20, page 112, Regulations of 1881, contain the Regulations of the *State Department* on the subject of such foreign-built craft. It will be observed that there are no marginal references to any United States statute, and that the whole is pure department legislation. The different paragraphs are inconsistent and contradictory; e. g., paragraph 226, Regulations 1874, says: "The privilege of carrying the American flag is under the regulation of Congress, and the statutes have not made that privilege practically available to any ship except those duly registered, or enrolled at some custom-house."

Paragraph 194, Regulations 1881, says: "In the case of American or foreign-built vessels purchased abroad and wholly owned by American citizens, it is known that the crews are usually made up of men who are not American citizens, and who have not acquired the character of American seamen under the law, as set forth in paragraph 188. Seamen of this class, when not serving under a contract made in the United States, *are not regarded as within the jurisdiction of a consular officer as to their shipment or discharge.*" As such vessels, with their cargoes, would be forfeited if they entered a United States port, of course all their shipping contracts are made abroad. They are navigated exclusively by foreigners, and employed in trading on the China coast. The service of the consul is purely voluntary, as it is not required by law. Masters, for purposes of discipline, in order to command the obedience of their crews, get them to sign articles before a consul. It is done for the accommodation of shipmasters. The master of an American documented vessel has the right to demand the service, as he incurs a penalty by going to sea without shipping his crew regularly before the consul. Paragraph 190, Regulations 1881.

" post until the latter date, when he returned to the United States.

"II. During his term he turned into the Treasury the sum of " $5,147.00 on account of fees collected for examining Chinese " emigrants going to the United States on foreign vessels; of this " sum $3,923.50 were collected prior to September 1, 1881; and " $1,223 50 were collected between September 1 and December " 31, 1881.

"Said fees were voluntarily paid by the masters and charterers of " said vessels at whose solicitation the service was rendered, and were " collected in good faith by the consul.

"III. Soon after assuming charge of the consulate, to wit, Feb- " ruary 21 and March 19, 1879, claimant informed the Department " of State that since the enactment of the law of February 19, 1862, " prohibiting the coolie trade in which American vessels had been " engaged, it had been the practice at Hong-Kong to procure for " American and foreign vessels carrying Chinese passengers to the " United States a consular certificate of the fact that they were free " and voluntary emigrants.

" The claimant addressed said communications to the State " Department to establish that the fees belonged to him; but paid " into the Treasury before receiving a reply the sum of $731.75.

" In reply to a claim that he, the consul, was entitled to such fees, " the Secretary of State replied, in substance, that the fee is an official " fee, and must be accounted for to the Treasury.

" IV. He gave written advice to the agent of the O & O. S. " S. Co., at Hong-Kong, to send steamships which were under the " English flag, without a consular certificate, for the Chinese emi- " grants, as no law required it, and the agent declined to do so.

" A copy of his letter to the said agent was forwarded to the State " Department. It does not appear that the Department replied to " his communication accompanying said letter.

"V. The Bothwell Castle, an English steamship, sailed from " Hong-Kong about January 6, 1882, carrying Chinese emigrants " without the usual consular certificate of examination, but with a " letter from the United States consul, addressed to the collector at " San Francisco, explaining why the master did not have it.

" Said vessel entered the port of San Francisco without trouble " about February 1, 1882; all other foreign vessels after that time " ceased to procure the said consular certificate.

"A copy of said letter to the collector at San Francisco was for-
" warded to State Department; but claimant did not receive a reply.

"All emigration fees collected up to December 31, 1881, were
" turned into the Treasury.

"VI. The sum of $633.25 was collected in January, 1882, for
" examination of Chinese on foreign vessels, which was first credited
" and then charged back to the Treasury; and a letter was written by
" the claimant to the First Comptroller explaining that item in his
" accounts. The Comptroller allowed the item as a proper charge.

"VII. The charterers of foreign vessels who had paid these fees
" to the consul afterwards applied to the Treasury to have them
" refunded, which was refused by the Comptroller on the ground
" ' that the collection of said fees was proper and they should not be
" ' refunded.'

"VIII. The claimant, after his removal from office, claimed the
" emigration fees from foreign vessels. His claim was also dis-
" allowed.

" The fees collected subsequent to January 3, 1882, were refunded
" by the consul to the parties who paid them.

" The consul was not charged with the fees so refunded, or those
" he might have collected, if he had not declined to continue the
" practice of examining Chinese emigrants on foreign vessels. The
" claimant refused to collect fees after receiving from the State
" Department notice that such fees must thereafter be accounted
" for as official fees. Said notice, in the form of a letter from
" the Department, was dated on said date, and reached claimant in
" due course of mail.

* * * * * * *

"XIII. The payment by the claimant of these several sums of
" money into the Treasury was for the purpose of avoiding a con-
" troversy with the Department. Soon after the claimant was re-
" moved from office, and before a final settlement of his accounts he
" made a demand that all fees now claimed be credited to him.

"XIV. At the request of claimant's counsel, the following facts
" are also found:

" Said claimant wrote to the State Department, March 19, 1879,
" as stated in Finding III, in which communication he informed said
" Department that it had been the habit of his predecessors to retain
" said fees as unofficial, and asked to be instructed whether he, the
" claimant, was not entitled to same.

where the goods are appraised and the duties liquidated. The consul retains one of the quadruplicates in his office, and sends the other enveloped under seal to the collector of the port of final delivery.

The Act of June 10th, 1880, requiring a consul to certify quadruplicates for $2.50, applies to a very limited number of cases: *i. e.* goods coming from Hong-Kong to San Francisco to be transhipped overland to New York. The Act has nothing to do with the case, say, of goods shipped from Hong-Kong to a consignee in San Francisco. The goods would be entered and appraised, and duties paid, at San Francisco, the port of first arrival, and delivered to the consignee there. In such a case the statute requires the consul to certify a triplicate for $2.50; if he chooses, he can certify any additional number of copies and charge his own price. If he conforms to the fee prescribed by the Regulations, no one else can object to it. Nearly all the paragraphs of the Consular Regulations are mere departmental orders; but, as has been shown, a fee to be *official* must (1) have been prescribed by *the President*, and (2) the service designated as official by him. The only reference to the President in the Regulations of 1881 is paragraph 406: "The following is the revised tariff of *official* fees prescribed by *the President*," etc. (Paragraph 330, Regulations of 1874.)

Now, the fee ($2.00) for issuing an *extra* copy of an invoice is not put in the table prescribed by the President; hence, cannot be official. It is in paragraph 668, Regulations of 1881, which is identically the same at paragraph 491, Regulations of 1874: "Copies prepared by other persons for their own use will, on request, be certified on payment of two dollars." If goods are shipped to the United States to a port designated in section 1, to be forwarded to a port named in section 7 (Act June 10th, 1880), the fee for a quadruplicate is only $2.50; in all other cases $4.50. The invoice shows on its face the port or ports to which the goods are consigned.

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Fees were claimed and allowed by the Court for shipping and discharging seamen on foreign built vessels owned by American citizens and sailing under the U. S. flag. All the sections of the Revised Statutes which require consuls to perform such service for masters, refer exclusively to the registered vessels of the United States. No others

are recognized in law (Section 4,311, R. S.) The Court of Claims, in its opinion, (p. 13.) says: 'It is insisted by claimant, that while he was *empowered* to perform the services, he was not required to do so by any statute of the United States, and the performance of the service not being required by law, he has a right to all charges paid for such service. * * The duty performed in this instance was shipping and discharging seamen in a foreign-built ship, sailing on the China coast under the United States flag. The seamen were not American citizens, and did not ship from a port of the United States, so as to come within the provisions of paragraphs 129 and 130 of the Regulations of 1874."

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In a circular of February 18th, 1880, Mr. Evarts, Secretary of State, instructed consuls that foreign seamen on these foreign-built craft, are not entitled to relief as destitute American seamen. "Seamen of this character, therefore," he says, "serving on the vessels referred to, under a contract not made in the United States, are not considered to be within the jurisdictional cognizance of the consul, as to their contract of shipment or discharge."

The State Department issued a circular July 28th, 1885, based on an opinion of the Attorney General, who said: "I conclude, therefore, that foreign-built vessels, owned by citizens of the United states, are not embraced in the provisions of the Act of 1884 (June), forbidding the collection of fees by consular officers from American vessels." (Atty. Genl., July 22th, 1885.)

Badger vs. *Gutierez*, 111 U. S., 736.

In the case of *White's Bank* vs. *Smith*, 7 Wall., 656, the Supreme Court said, speaking of such vessels: "They are of no more value as American vessels than the *wood and iron of which they are constructed.*"

Notarial Fees. Finding 12, p 5, Record.

See paragraphs 471–481, Regulations of 1881; paragraphs 308–312, Regulation of 1874, and section 1,750, R. S., on subject of notarial work. The Court allowed a portion of such fees that were claimed and disallowed a part. See opinion, page 12, Record. The fees disallowed are:

(*a*) Fees collected from February 4, 1879, to December 31, 1880, for recording instruments.

(*c*) Interest on deposits in bank at Hong-Kong.

(*e*) Fees collected during fourth quarter, 1881, for "certificates of shipments" (extra copies invoices).

The Court says: "The first charge is for recording instruments; but it does not appear from the proof or specification, what was the character of the instruments recorded, and it is, therefore, impossible to determine whether the recording came within the Regulations of 1874 or 1881." Clearly, this is an oversight by the Court, as to recording. The specification, according to its own finding, does show that it was

done "from February 4th, 1879, to December 31st, 1880," when, of course, the Regulations of 1874 were in force.

Article 25 (page 100), Regulations of 1874, contains a list of the record books whice are required to be kept at all consulates. They are for the purpose of keeping a record of the consul's dispatches, official letters, official fees, accounts and other *official* documents. Of course, the fees claimed are not for such work; the fact that fees were collected by him from parties shows that they are not records of the consul's official acts which the Regulations require to be kept, but that they relate to purely *private* transactions between individuals.

Persons abroad often desire to keep a permanent record of deeds, wills, bills of sale, powers of attorney and other such documents, in order to preserve and perpetuate testimony. No law or regulation requires a consul to keep such records or do this work, which is purely *clerical* In doing it he does not use his official title or seal. Even the obscure paragraph 321, Regulations of 1874, defining official fees, says, that to make an act "*official*," the consul must use his "seal and title."

Item (*c*) disallowed for *interest* paid the consul by Hong-Kong Bank on deposits. Consuls are required to render quarterly statements and remittances of balances. During a quarter a considerable sum of money may accumulate in a consul's hands. He is forbidden to remit it to the Treasury before the quarter closes. (Regulations of 1884, paragraph 336.) If he keeps it in the consulate a loss by robbery might fall on the Government. Paragraph 453, Regulations of 1881, informs consuls that they deposit public money in bank at their own risk. Ordinarily, money will be more secure in a bank than in the consulate, as the Government provides no guard. As the consul is responsible on his bond for the deposit, it is only just that he should get the interest, as he insures the bank. The U. S. statutes forbidding officers to loan or deposit public moneys on interest do not apply in this case. In the United States there are authorized public depositories where officers can place their funds and be relieved of responsibility. There are no such depositories in China.

Fees for Examining Chinese Going to the United States on Foreign Vessels.

The Court of Claims finds:

"I. The claimant was consul of the United States at Hong-
"Kong from February, 1879, until July, 1885, and remained at his

" post until the latter date, when he returned to the United States.

"II. During his term he turned into the Treasury the sum of " $5,147.00 on account of fees collected for examining Chinese " emigrants going to the United States on foreign vessels; of this " sum $3,923.50 were collected prior to September 1, 1881; and " $1,223 50 were collected between September 1 and December " 31, 1881.

"Said fees were voluntarily paid by the masters and charterers of " said vessels at whose solicitation the service was rendered, and were " collected in good faith by the consul.

"III. Soon after assuming charge of the consulate, to wit, Feb- " ruary 21 and March 19, 1879, claimant informed the Department " of State that since the enactment of the law of February 19, 1862, " prohibiting the coolie trade in which American vessels had been " engaged, it had been the practice at Hong-Kong to procure for " American and foreign vessels carrying Chinese passengers to the " United States a consular certificate of the fact that they were free " and voluntary emigrants.

"The claimant addressed said communications to the State " Department to establish that the fees belonged to him; but paid " into the Treasury before receiving a reply the sum of $731.75,

" In reply to a claim that he, the consul, was entitled to such fees, " the Secretary of State replied, in substance, that the fee is an official " fee, and must be accounted for to the Treasury.

"IV. He gave written advice to the agent of the O & O. S. " S. Co., at Hong-Kong, to send steamships which were under the " English flag, without a consular certificate, for the Chinese emi- " grants, as no law required it, and the agent declined to do so.

" A copy of his letter to the said agent was forwarded to the State " Department. It does not appear that the Department replied to " his communication accompanying said letter.

"V. The Bothwell Castle, an English steamship, sailed from " Hong-Kong about January 6, 1882, carrying Chinese emigrants " without the usual consular certificate of examination, but with a " letter from the United States consul, addressed to the collector at " San Francisco, explaining why the master did not have it.

"Said vessel entered the port of San Francisco without trouble " about February 1, 1882; all other foreign vessels after that time " ceased to procure the said consular certificate.

"A copy of said letter to the collector at San Francisco was for-
" warded to State Department; but claimant did not receive a reply.

"All emigration fees collected up to December 31, 1881, were
" turned into the Treasury.

"VI. The sum of $633.25 was collected in January, 1882, for
" examination of Chinese on foreign vessels, which was first credited
" and then charged back to the Treasury; and a letter was written by
" the claimant to the First Comptroller explaining that item in his
" accounts. The Comptroller allowed the item as a proper charge.

"VII. The charterers of foreign vessels who had paid these fees
" to the consul afterwards applied to the Treasury to have them
" refunded, which was refused by the Comptroller on the ground
" ' that the collection of said fees was proper and they should not be
" ' refunded.'

"VIII. The claimant, after his removal from office, claimed the
" emigration fees from foreign vessels. His claim was also dis-
" allowed.

"The fees collected subsequent to January 3, 1882, were refunded
" by the consul to the parties who paid them.

"The consul was not charged with the fees so refunded, or those
" he might have collected, if he had not declined to continue the
" practice of examining Chinese emigrants on foreign vessels. The
" claimant refused to collect fees after receiving from the State
" Department notice that such fees must thereafter be accounted
" for as official fees. Said notice, in the form of a letter from
" the Department, was dated on said date, and reached claimant in
" due course of mail.

* * * * * * *

"XIII. The payment by the claimant of these several sums of
" money into the Treasury was for the purpose of avoiding a con-
" troversy with the Department. Soon after the claimant was re-
" moved from office, and before a final settlement of his accounts he
" made a demand that all fees now claimed be credited to him.

"XIV. At the request of claimant's counsel, the following facts
" are also found:

"Said claimant wrote to the State Department, March 19, 1879,
" as stated in Finding III, in which communication he informed said
" Department that it had been the habit of his predecessors to retain
" said fees as unofficial, and asked to be instructed whether he, the
" claimant, was not entitled to same.

" The said Department replied as follows: 'It is now deemed to " 'be the more advisable course to prescribe the fee as an official one " 'to be accounted for to the Treasury.'

" In instructions to said claimant, dated August 26, 1879, the said " Department instructed claimant that the fees for acts which the " consul is empowered but not required by law to perform, and which " relate only to private transactions, are *un*-official.

" CONCLUSIONS OF LAW.

" The Court determines as conclusions of law that the claimant is " entitled to recover as follows:

" For examining Chinese emigrants departing on foreign " vessels to the United States	$5,147.00
" For certifying invoices of goods in transit through the " United States	5,805.00
" For items b, d and f, in Finding XII	208.21
" For services to foreign-built vessels carrying the American " flag	584.00
" For certifying invoices of goods imported to the United " States which were on the free list	2,095.00 "

Attention is called to the finding of the fact that "said fees were *voluntarily* paid by the masters and charterers of said vessels, at whose solicitation the service was rendered, and were collected *in good faith* by the consul." The title of the Act of February 19th, 1862, is, "An Act to prohibit the '*coolie*' trade by American citizens in American vessels."

12 U. S. Stat. at Large, p. 340. Sec. 2,158, R. S.

It appears that as soon as the claimant assumed charge of the Hong-Kong consulate, February 4th, 1879, he informed the State Department that ever since the enactment of the Act of February 19th, 1862, his predecessors had applied it to all vessels, both American and foreign, departing from that port to the United States with Chinese emigrants, and that they had approriated the fees from this source. In reply, the Department said: "It is *now* deemed the more *advisable* course to prescribe the fee as an official one, to be accounted for to the Treasury." It further appears that the practice which had prevailed for seventeen years of procuring a consular examination and certificate

for all Chinese emigrants to the United States continued for some time, against the written advice of the claimant, until he refused to make the examinations or give the certificate. The Department was informed of it and acquiesced, thereby acknowledging its erroneous construction of the statute. While acquiescing in the consul's interpretation of the law, it uttered no word of approval or disapproval. It is clear that Chinese emigration to the United States was not the mischief the statute intended to suppress, but the *coolie* or slave trade in Chinese, in which American vessels were engaged with Spanish America. No *coolies*, in the sense of the statute, were ever brought to the United States. It was piracy for British vessels to engage in carrying coolies. This gave the monopoly to American vessels. The Act of Congress was in furtherance of the policy of emancipation.

The coolie Act was not designed to apply to or affect Chinese emigration to California. It has not a feature in common with the Chinese Restriction Act of 1882 and as amended, in 1884. These were directed against the evil of Chinese emigration to the United States. The Restriction Act does not speak of "*coolies*," but of emigrants. Chinese emigration to the United States is not included in the letter or policy of the *coolie* Act. At that time, such emigration to California was encouraged. The labor was needed to build railroads.

In the case of *Chae Chan Ping* vs. *United States*, 130 U. S., 581, Mr. Justice Field said: "Neither the treaty of 1844 nor that of 1858 touched upon the migration and emigration of the citizens and subjects of the two nations respectively from one country to the other. But in 1868 a great change in the relations of the two countries was made in that respect. In that year a mission from China, composed of distinguished functionaries of that empire, came to the United States with the proposed object of establishing closer relations between the two countries and their peoples. At its head was placed Mr. Anson Burlingame, an eminent citizen of the United States, who had at one time represented this country as commissioner to China. He resigned his office under our Government to accept the position tendered to him by the Chinese Government. The mission was hailed in the United States as the harbinger of a new era in the history of China. * * It was not until the additional articles of 1868 were adopted that any public declaration was made by the two nations that there were advantages in the free migration and emigration of their citizens and subjects respectively from one country to the other, and stipulations given that

each should enjoy in the country of the other, with respect to travel or residence, the privileges, immunities and exemptions enjoyed by citizens or subjects of the most favored nation."

The *coolie* Act prohibited American vessels from transporting Chinese to *foreign* (not American) ports to be sold into slavery. (Section 1, Act of February 19th, 1862, Sec. 2158 R. S.) They could not have been *sold* in California. England has conducted a crusade against slavery all over the world for fifty or sixty years. It would be as absurd for Congress to pass a law to suppress the slave trade from London as from Hong-Kong. In Siemens *vs.* Sellers, 123 U. S. Rep., 285, the Supreme Court said: "No doubt the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history." Chinese emigration to the United States is inconsistent with the letter as well as the spirit of the statute. Section 1 prohibits the equipment of any United States vessel for the purpose of transporting Chinese to any *foreign* country to be sold, or held to service. It would have been as absurd for Congress to prohibit American vessels from carrying Chinese to be sold in Liverpool as in California. Sections 2 and 3 prescribe the penalty of forfeiture of the vessel, and fine and imprisonment of the persons so engaged. Section 4 says the Act does not intend to interfere with free emigration; but the United States consul at the port of departure must examine the emigrants and give the master a certificate. This is a precaution to prevent kidnapped Chinese being carried away. Section 6 authorizes the President to order commanders of United States war vessels to arrest American vessels on the high seas if there is probable cause to believe they have *coolies* on board, carry them into a United States port, and deliver them to a marshal. It would be absurd to seize and carry a vessel into a port to which it was already bound. Section 5 applies the provisions of the two passenger Acts (9 Statutes at Large, pp. 127 and 399,) to vessels engaged in carrying Chinese between *foreign* ports. Those two Acts applied to *all* vessels running between American and foreign ports. The duty of executing the coolie Act devolved on consuls; that of executing the Chinese Restriction Act on the collectors of customs. (United States *vs.* Jung Ah Long, 124 U. S., 627; Act of May 6th, 1882, amended July 5th, 1884.)

A master arriving at an American port was not required by Act of February, 1862, to produce *any* proof to a collector that the Chinese

were voluntary emigrants If the *coolie* Act had been intended to apply to vessels bringing Chinese to the United States, it would have been applied, like the Restriction Act, to vessels of every nationality, and some duty of inspection in regard to them imposed on officers in the United States. Otherwise the absurdity must be imputed to Congress of legislating in favor of giving *foreign* vessels a profitable monopoly. The claimant discontinued examining Chinese going to the United States on foreign vessels after January, 1882; and on American vessels after July, 1882. He remained as consul at Hong-Kong until the 21st of July 1885. The practice has never been resumed; but the *coolie* Act has never been repealed. It may be asked why the emigration fees collected on account of American vessels are not claimed as well as for foreign vessels. The answer is this: The Court of Claims finds that these fees were for services performed at the solicitation of masters of foreign vessels. The practice had prevailed so long no doubt it was considered better to pay the examination fees and get a certificate than to run the risk of litigation in San Francisco. If masters made a mistake in the law the consul was not responsible for it. The Court finds that he collected the fees "*in good faith*." He had no power over a foreign vessel in a foreign port. Hence the fees he collected were a voluntary payment, and the maxim *volenti non fit injuria* applies. *Ex æquo et bono* he is entitled to the fees, as he did the work. But American vessels stand on a different footing. The emigration fees were all collected under the instructions of the State Department. The consul could exert a coercive power over an American vessel to compel payment of fees (Section 1,718 Revised Statutes, paragraph 188, Regulations of 1881). Although there was in fact no actual coercion, a payment under mistake of law, when there exists the relation of dominion on one side and submission on the other, will not be regarded as voluntary. It is true the government has no *legal* right to these fees, but being in possession it can retain them against every one but the parties who paid them; for *melior est conditio possidentis*. If instead of paying the latter class of fees into the treasury he had retained them the government could not have recovered them.

The Regulations of 1863, say (Section 145, page 63): "The Important Act of Congress, approved February 19th, 1862, 'to prohibit the coolie trade by American citizens in American vessels,' is commended to the special consideration of all consular officers in

China." The Regulations of 1870 and 1874 contain substantially the same. The Regulations of 1874 construe the *coolie* Act, as relating to carrying *coolies* "from one foreign port without the United States to another port *without* the United States." Of course, when consuls in China executed the Act, they had the right to charge for it. As there had been no fee prescribed by the President, and the service had not been designated by him as official, they fixed the *rates* of the fees and appropriated them. This is an instance where a consul may do an act which it is his duty to perform, but the fee for it is his perquisite.

The Regulations of 1881, for the first time, prescribed a fee for performing this duty, and made it official. (Item 35.) "To the examination required by Section 2,162 of the Revised Statutes, for each emigrant (Art. 21)—25 cents." The title of Article 21 is: "Duties as to American vessels engaged in the transportation of Chinese and other emigrants." Nothing is said about foreign vessels. The law did not require of the consul at Hong-Kong to perform any duty in respect to Chinese passengers. Consequently the President did not and could not prescribe any fee for such a service. If he had done so, it would have been equivalent to instructing the consul that the law required him to perform it. The President could only prescribe a fee for executing the law.

The emigration fees, on account of foreign vessels, are claimed because, (1) no fee was ever prescribed for such a service by the President; (2) as the law did not require a consul to perform it, the President would have had no right to prescribe such a fee, and such a rule or regulation *would have been arbitrary, unreasonable and void.*

The Court finds that while the claimant's predecessors appropriated Chinese emigration fees from both American and foreign vessels, in answer to an inquiry from the claimant, the department wrote: (1879) "It is now deemed to be the more advisable course to prescribe the fee as an official one, to be accounted for to the Treasury." (Findings 3 and 14.) This dispatch from the department can have no more legal weight in determining the question of right to the fees than if it had never been written. The State Department had no jurisdiction, legislative or judicial, either to prescribe fees and designate such a service as official, or to decide who was entitled to them after they had been collected. The dispatch was without authority of law, and is extra-official. As was said by Hopkinson, J., in *U. S.* vs.

Duval, 1 Gilpin, 372: "The opinion of the Secretary (of the navy) will have the influence to which his character and station entitle him. As authority it is nothing." The President could not transfer to the State Department his legislative power to prescribe consular fees. This extraordinary power is purely personal and cannot be performed by a deputy.

Runkel's case, 122 U. S. 544, *supra*: In that case the Supreme Court decided that the President could not delegate any *judicial* power; for the same reason he cannot delegate the legislative given him by Section 1,745, Revised Statutes. Prescribing the *rates* of consular fees is not an executive or administrative function. If the act done by the Secre ary of State had been within the sphere and scope of his authority, it would be presumed to have been rightly done, and could not be questioned collaterally. But it was clearly *ultra vires* and *subject to review by this Court.*

The Regulations issued in 1863, 1870 and 1874 enjoin the duty on consuls in China of executing the Coolie Act, but prescribe no fee for it. Hence the *fee was unofficial.* When, in 1879, the State Department instructed the consul at Hong-Kong to account to the Treasury for such fees, it was a clear *act* of unfriendly discrimination against him. The Regulations of 1874 were then in force, and as they prescribed no such fees, the general rule was that such fees were *unofficial*, and all consuls could appropriate them. A special rule was made for the consul at Hong-Kong, or rather he was excepted from the general rule. Such an order made even by the President would have been partial, unfair and consequently invalid.

The President must promulgate a uniform and general rule on the subject or none at all. He had no authority to permit all other consuls to retain these fees and require the consul at Hong-Kong to account for them. In doing so he would have been guilty of an abuse of power. Such an act of tyranny would not be tolerated in a free government. "In a free country," said Attorney General Legaré, "every act of injustice, every viola ion of the principles of equality and equity, is *ex vi termini* a breach of all their fundamental laws and institutions." An act which exhausts itself on a single person is not a law, but a sentence. A Presidential ordinance fixing a tariff of fees must be "the law of the land", which, as defined by Blackstone, means "a *rule*, not a transient, sudden order from a superior to an inferior concerning a particular person, but something permanent,

uniform and universal." An ordinance of the City of San Francisco required the shaving of the heads of prisoners. It was intended for the Chinese. In *Ah Kow* vs. *Nunan*, 5 Sawyer, 559, Mr. Justice Field said: "The second objection to the ordinance in question is equally conclusive. It is special legislation on the part of the Supervisors against a class of persons who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. It is certainly something in which a citizen of the United States may feel a generous pride that the Government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is caught upon the broad shield of our blessed constitution and our equal laws." The claimant is as much entitled to "the equal protection of the laws" as the Asiatics who come to California.

All emigration fees collected up to December 31, 1881, were paid into the Treasury. Those collected in January, 1882, from foreign vessels, were first credited to the Treasury; the consul then refunded the fees (Findings 6 and 7) to the proper parties, and *charged* them to the Treasury He called the attention of the Comptroller to the item in a letter, and it was passed. He decided that the fees did not belong to the Government, and that the consul had the right to refund them. Parties applied to the Comptroller to refund the same class of fees that had been paid into the Treasury; the Comptroller refused, "on the ground that the collection of said fees was proper, and they should *not* be refunded," although he had allowed the consul to do so. Clearly, if they neither belong to the Treasury nor the parties who paid them, they must belong to the consul.

The State Department again wrote the claimant on January 3, 1882, that emigration fees from foreign vessels must be accounted for to the Treasury. (Finding 8, p. 4.) All such fees collected *after* the date of the dispatch were refunded, and are not now in controversy. Those now claimed were all collected prior to that time. The *ex post facto* order of January 3, 1882, from the State Department, could not affect the consul's rights in the fees already collected. It is an absolute nullity for several reasons:

(1) A special order from the President, excepting the consul at Hong-Kong from the general rule prescribed on the subject of emigration fees, would have been unjust discrimination, and null and void. The general rule is contained in the Regulations of 1881, and in them

he has prescribed no fee for examining Chinese on foreign vessels, and *he had no such right.*

(2) The special order does not purport to come from the President, but is a mere departmental order issued without authority of law.

(3) Even if the State Department had the right to fix the rates of consular fees and designate official services, like all legislative power, it must be exerted so as to operate *prospectively.* To give such an order a retroactive effect, so as to divest rights already acquired, would be depriving the consul of his property without "due process of law." The instant the fees were collected, the right to them passed either to the consul or the government. No subsequent order of the President or State Department could divest the rights of either party. Their rights were immediately fixed by the rule existing when the service was performed. It can readily be seen the abuses to which such a policy would lead, if the emoluments of consulates were regulated by no general rule, but each depended on the mere will of the President. In *U. S.* vs. *White,* Taney 155, the Chief Justice said: "The Regulations authorized by these Acts are understood to be a *general* regular tion, fixing *prospectively* the additional compensation for specified services within the limits prescribed by law, and guaduating it in different places as he (the Secretary) may, in his discretion, deem just and most advisable for the public interest; he is not authorized to give or refuse compensation, at his discretion or pleasure, in each particular case *after the service has been performed;* for that would open the door to favoritism and partiality, which it was the object of these laws to prevent." It is the end and aim of free government to deal out, with one weight, and one measure, even-handed justice to all. If the pretension of the department can be sustained, then Congress has repealed *Magna Charta and invested the President with the power of a Pasha.*

One ground of the refusal to refund the fees, was that they had been voluntarily paid into the Treasury. The Court finds that they were collected *in good faith,* "and paid *voluntarily* by the parties at whose solicitation the service was performed, and were paid into the Treasury for the purpose of avoiding a controversy with the department." (Findings 2 and 3.)

The doctrine of estoppel by voluntary payment applies only to parties standing on an equal footing. The claimant demanded the fees before the settlement of his accounts and as soon as he was

relieved of official pressure. When the money was paid, the consul and the Government were not, as was said by the Supreme Court in *Swift Co.* vs. *U. S.*, 111 U. S., *"on equal terms.* Money paid or other value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria."* In the case of *Huguenin* vs. *Basely*, 14 Vesey, 2 White and Tudor, L. C., Sir Samuel Romilly said *arguendo*: "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another." Lord Cottenham, in *Dent* vs. *Bennett*, 4 My. and Cr., 277, adopted the argument of Romilly as a true exposition of the principle of equitable relief. A payment or donation made under circumstances that deprive a party of his free will, is presumed to be the result of undue influence, and can be recovered. To impeach the transaction it is not necessary to show any overt act of compulsion. The undue influence will be presumed from the relations of the parties, and the ability of one to exert it. Laches can only be imputed to a party who is in a situation to enforce his rights. In Wald's Pollock on Contracts, 55, it is said: "Undue influence, as the term is used in Courts of Equity, means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other is not *specifically* proved, but is *inferred* from an existing relation of *dominion* on the one part, and *submission* on the other." The cases of *U. S.* vs. *Lawson*, and *U. S.* vs. *Ellsworth*, 101 U. S., 169-173, are directly in point. The parties, as collectors of customs, were entitled to compensation in salaries and fees. Under instructions of the Commissioner of Customs, they paid all fees into the Treasury, without claim or protest. After going out of office and settling their accounts, they sued for the fees. The defense contended that the payments were voluntary, as the Commissioner was a mere auditor of accounts and without political authority to enforce his instructions. The Supreme Court said: "Beyond all question the money was wrongfully exacted, and it is equally certain that in equity and good conscience it ought to be returned, etc. * * Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

Respectfully submitted,

JNO. S. MOSBY,

Pro Se.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT, *v.* JOHN S. MOSBY.	*No.* 1112.
JOHN S. MOSBY, *v.* THE UNITED STATES.	*No.* 1420.

Appeal from the Court of Claims.

SUPPLEMENTAL BRIEF FOR CLAIMANT.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT, *v.* JOHN S. MOSBY.	*No.* 1112.
JOHN S. MOSBY, *v.* THE UNITED STATES.	*No.* 1420.

Appeal from the Court of Claims.

Supplemental Brief for the Claimant.

Section 1745, R. S., was not intended as a limitation on the powers and duties of consuls. It simply authorizes the President to prescribe the rates of fees for official services. Clearly the word "*official*" here means those acts the fees

for which must be accounted for to the Treasury. Consuls do not derive their authority from the President, but from statute law and the usages of nations. It was not the object of the statute to restrict consuls to the performance of only such duties as the President might designate as "*official*." There is not one word of exclusion or prohibition in the section. It is contended on behalf of the United States (brief, pp. 7 and 8) that "it is the duty of the President to see to it that the circle of duties of that officer is at all times such as to meet the wants of our people in foreign countries," &c., and that, "the power of the President to add to the list of consular duties," from time to time, "as he may see fit," makes it unnecessary that consuls should step outside of the duties prescribed by the Executive. The enumeration of those duties in the President's regulations would seem to be exclusive and prohibitory as to all other matters, whether intended to be so or not, as we shall now endeavor to show."

The fallacy of this consists in the idea that in prescribing the rates of official fees the President is prescribing consular duties. The only power the President has is to define the rights of the Government in such fees. Because he has the right to designate what shall be regarded as "*official*" services does not imply a prohibition against a consul's performing other services. For many of the most useful functions a consul may perform the President has not seen fit to prescribe any fee. Section 1714, R. S., expressly declares that the specification of certain powers and duties to be performed by consuls shall not be construed as implying the exclusion of others resulting from the nature of their appointment.

It has always been the policy of the Government to allow consuls to retain a portion of the fees they collect as official perquisites. For this reason salaries have been

fixed at lower rates than if the consul got nothing but his salary. There is no prohibition against a consul's accepting compensation for performing services outside of the official schedule of fees. It has been the immemorial custom in the consular service to do so. If Congress had intended such a radical change, and to abolish the practice, it would have been so declared in express words, and not left to inference and conjecture. Consuls are prohibited by Sec. 1699 from trading—by Sec. 1716 from charging any fee, in addition to the one prescribed, for certifying an invoice; by Sec. 1719 from charging any commission for receiving and disbursing seamen's wages; by Sec. 1723 from charging greater fees than are allowed by law, and a penalty is prescribed for the offence. Why was there no prohibition against charging fees for services not in the official list and a penalty prescribed for it?

III.

Sec. 1747, R. S., requires consuls mentioned in schedules B and C to account for all fees collected. This section must be construed with others in the same chapter *in pari materia*. Sections 1724, 1728, and 1734, show that it refers to "*official* fees."

IV.

The act of June, 1855, to remodel the consular service, prescribed a schedule of consular fees. Mr. Cushing (7 Op. Atty.-Genl., p. 255) construing it, said: "This provision imposes in terms a special duty on consuls and commercial agents, which is to collect certain fees for the benefit of the Government. Does this provision in terms

forbid the receipt of any other fees? Undoubtedly not. * * * Was it the design of the section to require the collection of certain fees, and those only? If so, the section does not say this. It contains not a single word of general exclusion or prohibition. Nor can it by any established rule of construction be held to imply this, for the enactment that it shall be the duty of consuls and commercial agents to collect and pay over to the Government certain particular fees, is perfectly compatible with their lawfully demanding and receiving other fees, whether the same be or be not specified as the property of the Government." This language is equally applicable to section 1745, R. S., which does not contain a single word of prohibition or exclusion.

V.

If consuls have no right to collect any fees except those in the official tariff, then all consuls who have collected unofficial fees have been guilty of extortion and abuse of power, and have incurred the penalty for a criminal offence prescribed by Sections 1735 and 1736, R. S. If Congress had ever intended to make receiving such fees a felony, then it should first have prohibited consuls in plain language from taking them.

VI.

Instead of being against public policy, it has been the established policy of the Government to allow consuls to collect and retain fees as perquisites of office. It is the common law of the United States Consular Service. The practice is authorized by the Consular regulations and has been recognized as legitimate by every department of

the Government. The act of 1856, which is the basis of our present consular system, was construed by Judge Black as authorizing a consul to collect fees for extra-official services even from the Government in certain cases.

Pickett's Case, 9 Op. Att'y Gen'ls.

It has often been announced by this Court that in construing an ambiguous statute great weight should be given to the contemporaneous construction given to it by those charged with the duty of executing it, and that it should not be overruled without cogent reasons.

U. S. *v.* Pugh, 99 U. S., 269.

U. S. *v.* Moore, 95 U. S., 763.

In the case of U. S. *v.* Macdaniel, 7 Peters, 14, this Court said—

"Of necessity, usages have been established in every Department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change in such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

That the custom in the consular service of collecting and retaining unofficial fees has been well known to and recognized by Congress, is shown by Mr. Belmont's report (April, 1886) from the Committee on Foreign Affairs accompanying a bill to reform the consular service, which abolished unofficial fees and compensated consuls for their loss by an increase of their salaries. The report says: "All the consular officers empowered to collect fees, whether such fees have been heretofore known as unoffi-

cial or official, are required to make full return of them to the Treasury. * * In compensation for the loss of unofficial fees an increase is proposed in the salaries of many consular officers," &c.

VII.

In the brief for the United States, section 1765 is relied on. That section has no application to the case at bar. In Stansbury *v.* U. S., 8 Wall., 31, this Court said that it prohibited extra compensation to public officers for extra services. The claimant is not asking of the Government any extra compensation for extra services. He is not asking any compensation at all, but only restitution of his property.

VIII.

No trust would result to the Government (even if these fees had been unlawfully collected), but to the parties from whom they were exacted. (Sections 1735, 1736, R. S.), The Government cannot "blow hot and blow cold" at the same time. It cannot repudiate the acts of its officers as illegal and at the same time claim the benefit of them.

The Florida, 101 U. S., 37.

The following extract from the *Congressional Globe* (48th Congress, 1st session, pp. 4191–92, May 15, 1884) shows that Congress has legislated with full knowledge of the practice in the consular service of collecting unofficial fees. It is also an answer to what is said in the brief for the United States about "consuls perverting their offices to their own private advantage." In face of the fact, which was brought to its attention, that the claimant was receiving some $1,500 a year in addition to his salary in

unofficial fees, Congress increased his salary from $4,000 to $5,000.

Congressional Record, 48th Cong., 1st sess., pp. 4191, 4192:

Mr. BURNES. I ask the gentleman the question again. Take the consulate at Hong-Kong, where the consul is now receiving $4,000 per annum, which salary is by this bill increased to $5,000, in recognition of the admirable work he has performed there. I ask the gentleman if he does not know that in addition to that salary the consul receives $1,500 of fees besides?

* * * * * * *

Mr. HITT. The gentleman has spoken of the efficiency of our consul at Hong-Kong. The report before me shows that General Mosby, our consul at Hong-Kong, made no report of his official fees, and therefore I cannot answer what disposition was made by the Department to defray the contingent and other expenses of that consulate without examining the records at the State Department. But that consul did not himself receive one cent of the official fees.

Mr. BURNES. I assure my friend from Illinois (Mr. Hitt) that he is in error, and it devolves upon me to defend that officer of our Government. The report of the consul at Hong-Kong is complete and perfect. In answer to my esteemed friend from New York (Mr. Hiscock), I will say that the report of the Secretary of State shows that the salary of the consul at Hong Kong is $4,000, and that in addition he receives unofficial fees amounting to about $1,500.

* * * * * * *

Mr. HITT. I will answer the gentleman who is now speaking of official fees. As to official fees, the State Department say, as appears by the document referred to by the gentleman, that our Consul at Hong-Kong, in addition to his salary receives unofficial fees; that is, certain moneys paid him by individuals who employ him to render legal services, which services have nothing to do with

the Government, with commerce, or with public affairs, and that those fees amount perhaps to $1,500. Those are unofficial fees, payment for personal services rendered by the consul to Americans or any other persons who choose to ask him to perform services for them.

For example, if my friend from Missouri were passing through there, was unacquainted with any person, should be taken ill, wished to have his will drawn up, and could not, owing to the state of his health, use his own ample legal learning for that purpose, he might ask the consul to devote two or three days of his time to perform that private work for him, and then he would doubtless pay him something for it. The consuls receive such unofficial fees for service rendered to individuals who choose to ask them to perform it. Such fees doubtless are received by consuls in many places. The consul at Hong Kong, that being a place frequented by many Americans, doubtless has opportunities to make make a considerable sum in that way, and he says he has so received $1,500. But in a majority of consulates there are no unofficial fees."

Respectfully submitted.

JNO. S. MOSBY, *Pro se.*

RECEIVED U.S.
FILED.
JAN 16 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, *Appellant*,
vs.
JOHN S. MOSBY, *Appellee.*
No. 1,112.

JOHN S. MOSBY, *Appellant*,
vs.
THE UNITED STATES, *Appellee.*
No. ~~1,522.~~ 1420

Brief of Counsel for John S. Mosby.

This case arose in the Court of Claims, in which John S. Mosby claimed a return to him of fees paid by him into the Treasury, which were for services rendered by him while consul at Hong Kong, China, for parties, at their request, but which he claimed to be unofficial and which he was not required by law to perform.

The Court of Claims allowed to him five classes of fees, amounting in all to $13,839.21, from which allowance the United States has appealed.

The only assignment of error by the United States is that "*no* item of the said claim is founded in law."

The court disallowed certain items, amounting to about $15,000, from which disallowance the claimant appealed, though the record shows only the following errors.

ASSIGNMENTS OF ERROR.

The court erred in disallowing the following items, to wit:

Certifying extra copies or quadruplicate invoices of goods shipped to the United States, ...	$1,592 00
Certificates of shipments or extra invoices, ...	292 00
Recording instruments described in finding 12, . .	39 29

Interest on deposits 104.51

The question presented by the assignment of error, as shown by its terms and by the argument thereon, would seem to be, only, whether a consul has the right to *any fees whatever* beyond the amount of his salary. This point of law is entirely distinct from any question as to the legality of the consul's retaining certain classes of fees as unofficial instead of official fees, and as in my view, it is therefore the only question presented for discussion. I propose, so far as the appeal of the United States is concerned, to confine myself to this, and if I am wrong in this, to refer to the brief of the claimant himself, on file, which discusses each item exhaustively.

It has always been the policy of the United States to compensate consuls partly by salaries and partly by fees for specific services performed by them. There are certain services which the consul is required to perform by law or regulation, and there are others which he may perform at his option. He may, for example, act as a notary, and in such character may act or not, at his option. He is also authorized to take depositions in certain cases, which he may or may not do, as he wills.

In such cases it has been held that the fees belong to him beyond question. (See Op. of Atty.-Gen. Black in Pickett's case, 7th Opin. Atty.-Gen., 496.)

By Section 1745, R. S., the President is authorized to prescribe the rates of fees and to designate what shall be regarded as official services. Under this, from time to time, regulations have been made, prescribing what are official and what are unofficial fees. By dispatch of August 28, 1879, the Department of State instructed this claimant "that the fees for acts which the consul is empowered, but *not required by law* to perform, and which relate only to private transactions, are unofficial." (Record, p. 5.)

Regulations were made to take effect September 1, 1881, making a table of fees, and detailed what were designated as official fees, to be accounted for to the Treasury, those not specified in this table being declared to be unofficial and personal fees. The instructions of August 26, 1879, state the law correctly, as it is further elaborated in the opinion of the Court of Claims. (P. 10.)

A slight consideration will demonstrate that this *must necessarily* be the rule. Any other would be suicidal. The moment that the consul is told that there are certain acts which he may or may not perform; that is, that he *may* perform them, although the law does not require him to perform them, but that if he does, the fees therefor must be turned into the Treasury, he certainly will not perform such acts. He will not voluntarily render services for which he receives no compensation, if there is no law requiring him to do so. If there were a law requiring

a notary public to turn over fees for notarial services to the State, and yet giving him the option to perform them or not, he would be certain not to perform them.

It must be plain that the proper construction of Section 1747, as to the fees to be accounted for to the Treasury, is the class of fees referred to in Section 1745, which the President is authorized to designate as official. Counsel argues that the power of the President is not limited to services of a strictly Federal character, but extends to services which belong to the office of consul by immemorial usage. Suppose this to be so; how does it sustain the proposition claimed by him? It is not claimed that the President *has in fact* designated the services on account of which the fees are claimed as official.

By Section 1718 the services which consuls are required to perform for masters or commanders of vessels are such as consuls are authorized by law or usage officially to perform, which, however, shall be such as come within "the rates or tariff of fees," which the President designates, according to Section 1745.

The strong implication from this is, that the consul is *not* required to render such services as do not come within those designated by the President.

Counsel says (p. 8) that it is "entirely unnecessary that consuls should step outside of the duties prescribed by the Executive," because he may *add* to the list of consular duties from time to time such duties as are sanctioned by usage, as well as those under express authority of law. But how does this support his proposition of law?

The practice of discriminating as to what fees are official and to be accounted for to the Treasury, and what are unofficial and not to be accounted for, has existed so long and has become such an important part of our consular system, that it cannot be overthrown by the argument that it is against public policy.

Section 1765, quoted by counsel on p. 13 of his brief, refers to claims for services rendered to the United States, and to payment thereof by the United States. No charge, therefore, is to be sustained *against the United States*. It manifestly has nothing to do with claims for services rendered to individuals. In the case of Yates *vs.* The National Home, 103 U. S., 674, the claim was in direct violation of the rule expressly forbidding such claims, and it is not at all applicable to such a case as this. All the cases referred to by him relate to services performed for the United States.

The court erred in not allowing the fees collected from February 4, 1879, and December 31, 1880, for recording instruments, $39.39. The court did find that he paid these fees which he had collected for recording such instruments into the Treas-

ury. The court gave as a reason for disallowing them that it does not appear from the specifications or proof what was the character of the instruments recorded, and it is therefore impossible to determine whether the recording came within the regulations of 1879 or 1881. For ought we know the instruments may have been those specially provided for by the tariff of fees in the regulations prescribed by the President. We respectfully submit that the dates of the recording of these instruments, as found by the court, show that they could not have been within the regulations of 1881, being prior to 1881. We think, too, that it is not incumbent upon Mr. Mosby to show that the law did *not* authorize or require this to be done, but that it is upon the United States to show that the law *did* require it. No law can be found requiring him to record instruments of any kind; if so, it should be pointed out.

The court also erred in not allowing to him the claim of $1,592 for certifying extra copies of invoices of goods shipped to the United States, mentioned in its finding 10, on page 4. The court finds that this sum was collected before the first day of September, 1881; that is, before the regulations of 1881 came in force. The court also finds in finding 12, page 5, that Mr. Mosby paid into the Treasury for extra invoices of the same character to the amount of $292, which was collected during the December quarter of 1881, which would be in addition to the $1,592, and under the regulation of 1881. The court erred in not allowing these two items, amounting to $1,884.

The finding of the court, taken by itself, is not very plain as to the character of the extra copies or quadruplicate invoices mentioned. The opinion of the court, however, states these clearly, stating that the claim was based upon Sections 2853 and 2855 of the Revised Statutes of the United States and the regulations of the State Department of 1874, paragraph 11. (Record, p. 11.)

It will be noticed that the claim and the finding was not for certifying extra copies of quadruplicate invoices, but it is for quadruplicate invoices, showing that it is not for copies of quadruplicate invoices, but they are extra copies. The sections of the Revised Statutes of the United States, too, provide for invoices to be made in triplicate. An act of June 10, 1880, 21 Statutes at Large, 173, provides that invoices under that act shall be made in quadruplicate, and a stated fee is prescribed for the entire quadruplicate invoices as one fee. The meaning, then, of the claim and the finding in reference to it, is plainly, extra copies of these invoices, which were by the Revised Statutes of the United States to be made in triplicate.

It is called a quadruplicate only because it is the fourth copy;

but calling it a quadruplicate ought not to affect the merits of his claim. Now, Section 2853, Revised Statutes, prescribes that all invoices imported from any foreign country should be made in triplicate. One is to be given to the shipper, one to be delivered to the collector of the port where the entry is to be made, and one to be filed in the office of the consul. (See Section 2855, and record, pages 10 and 11.)

The fee for all of these is to be $2.50. (Section 2851.)

Now, this is all the law requires of the consul. If he chooses to make another copy for the use of any one, or any number of copies, it is the voluntary act of the consul. The law does not require it. The regulations prescribe that if the collector wishes copies, the consul shall furnish them to such collector free of charge, but for copies prepared for *other persons* for their own use, at their request, certifying that they are copies, on the payment of $2 a copy. If prepared by the consul himself, or if they are duplicates of the originals, he will be entitled to a schedule fee as for the original service.

I submit, however, that these regulations which direct the performance of services for the collector are not required by law. The regulation goes beyond the law in exacting such services of the consul. I claim, therefore, that Mr. Mosby was entitled to the fees for certifying the extra copies or invoices, whether for the use of the collector or any other person. The court itself states the law correctly when it says:

"While the President has full power on the question of determining what shall and what shall not constitute official fees, it must appear clearly from the regulations that he intended to include in official fees, which must be accounted for, the charges and collections for non-official acts before such charges and collections become proceeds in hands of consul liable to the demands of the Goverment."

This law applied to the findings on this subject fails to show that the Government had any right to exact from the consul the payment of this money, which was in his hands, to the United States.

This claim was not based upon certificates required by Congress of June 10, 1880. All the payments mentioned in finding 10 were made before September 1, 1881, and as the act was not in existence until 1880, of course the regulations of 1874 had no relation to it. This act of 1880 related to cases where the goods were to be delivered at some other point than the port of entry, as, for example, at New York *via* San Francisco. Quadruplicate certificates were required because there was an additional custom-house where a certificate was necessary. There were two collectors instead of one, thus requiring quadruplicate

copies, and for them, by such act, a fee of $4.50 was allowed for the whole. The certificates of shipment for extra invoices mentioned in finding 12 appear to be $2.50, showing that they were the extra invoices described in paragraph—, regulations of 1881, which says, "when, however, duplicates of originals are required, or the copy is prepared by the consul, the schedule fee will be exacted as for the original service, which fee is $2.50, as shown by Section 2851 of the Revised Statutes, United States.

The act of June 10, 1880, has nothing to do with this case. It was not in existence when the regulations of 1874 were made, and such regulations, of course, could have had no reference to this act. Finding 10 shows that the claim is upon invoices for goods shipped *to* the United States; not to a port *within* the United States.

The opinion of the court below is somewhat indefinite and seems to confound the two cases—those referred to in Section 2853 of the Revised Statutes, and those referred to in the act of June 10, 1880.

The opinion speaks as one for extra copies *of* quadruplicate invoices, instead of extra copies *or* quadruplicate invoices, this being different from both the claim and the finding. The court says that the act pertains to the duty specifically prescribed by the laws of the United States, and yet it says that the party making application is entitled to a certificate, if it is a copy of the document executed in triplicate, which can mean nothing more than a copy of the certificates in triplicate described by the Revised Statutes, United States. The court states that this is an official duty, and that the emolument is an official fee. This, we think, is erroneous, as we have said a copy of this triplicate certificate is not required to be made by law. It is a voluntary act on the part of the consul, and cannot be made an official fee. A fair construction of the finding in connection with the claim will show that the claim is for copies of the invoices provided for by the Revised Statutes, United States.

Of course no one would suggest that a claim could be based upon certifying invoices described in the act of June 10, 1880. That act is perfectly plain, and provides a fee for the certificates to be made in quadruplicate of $4.50. Nor is it reasonable to suppose that the claim would be based upon copies furnished to the collector of the port. The regulations of 1874 are perfectly plain in regard to that.

The claim is for the copies furnished to *other persons* than the collector; that is, to shippers who wished extra copies for their use. There is no requirement of law that the consul should furnish such extra copies, and therefore the exaction of the consul that he should turn over the fees which he has thus earned to the United States was not justified. *Prima facie* fees

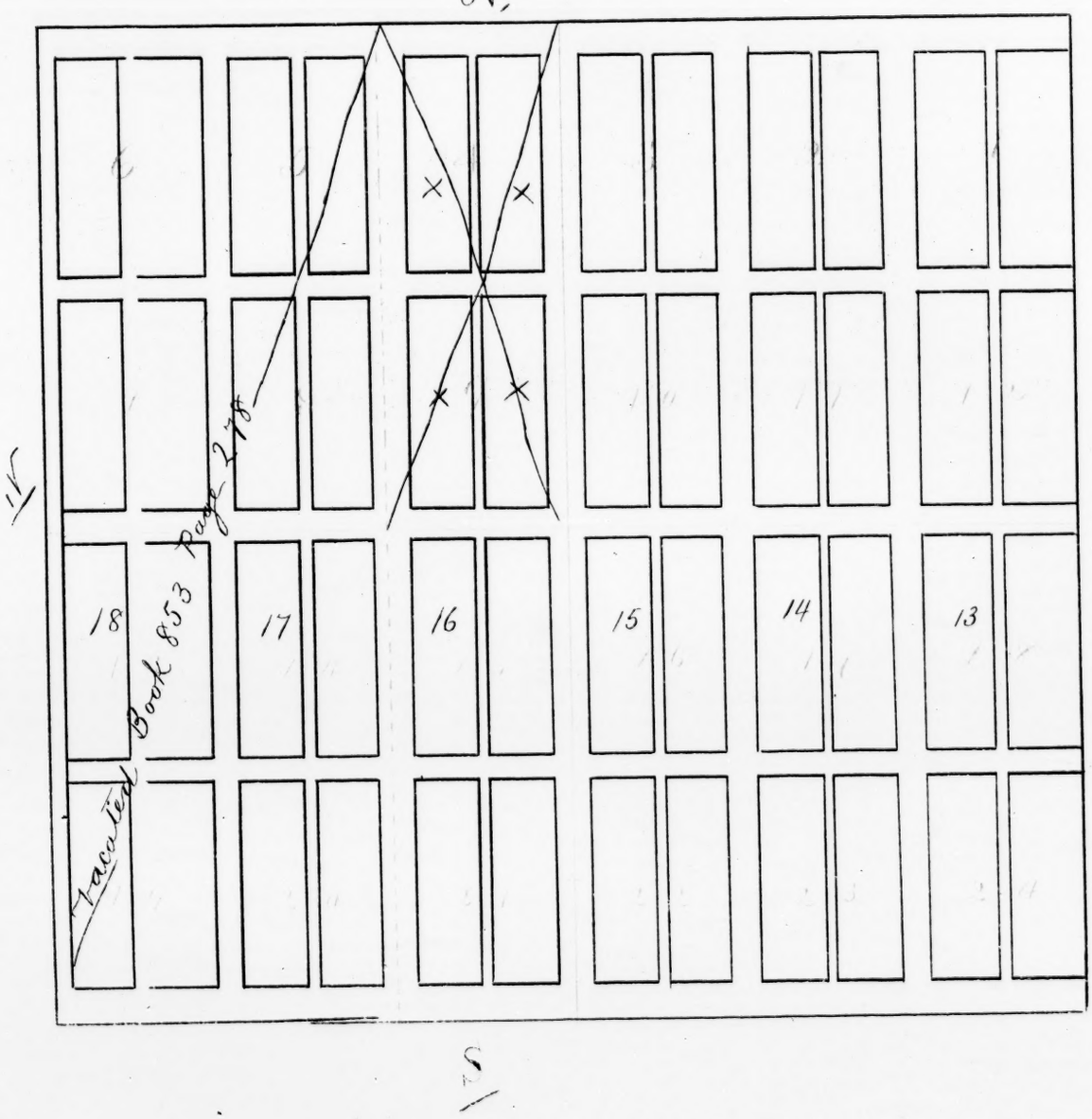
earned by the consul are his. In order to justify the demand by the United States that he should pay them into the Treasury, there must be findings of such facts as would justify such action. Had the decision of the court on these two items been in favor of the claimant upon these findings of the court, and an appeal thereon been taken, such appeal could not have been sustained on these findings.

A fair construction of Section 707, Revised Statutes, would be the entire amount in controversy, including the sum allowed in the court below. In this case, however, the amount disallowed was about $15,000. This would give the court jurisdiction.

W. WILLOUGHBY,
Counsel for John S. Mosby.

No. 1370.
Fitzsimmons, Assignee
v.
Manufacturers Natl Bk
} 11. 206

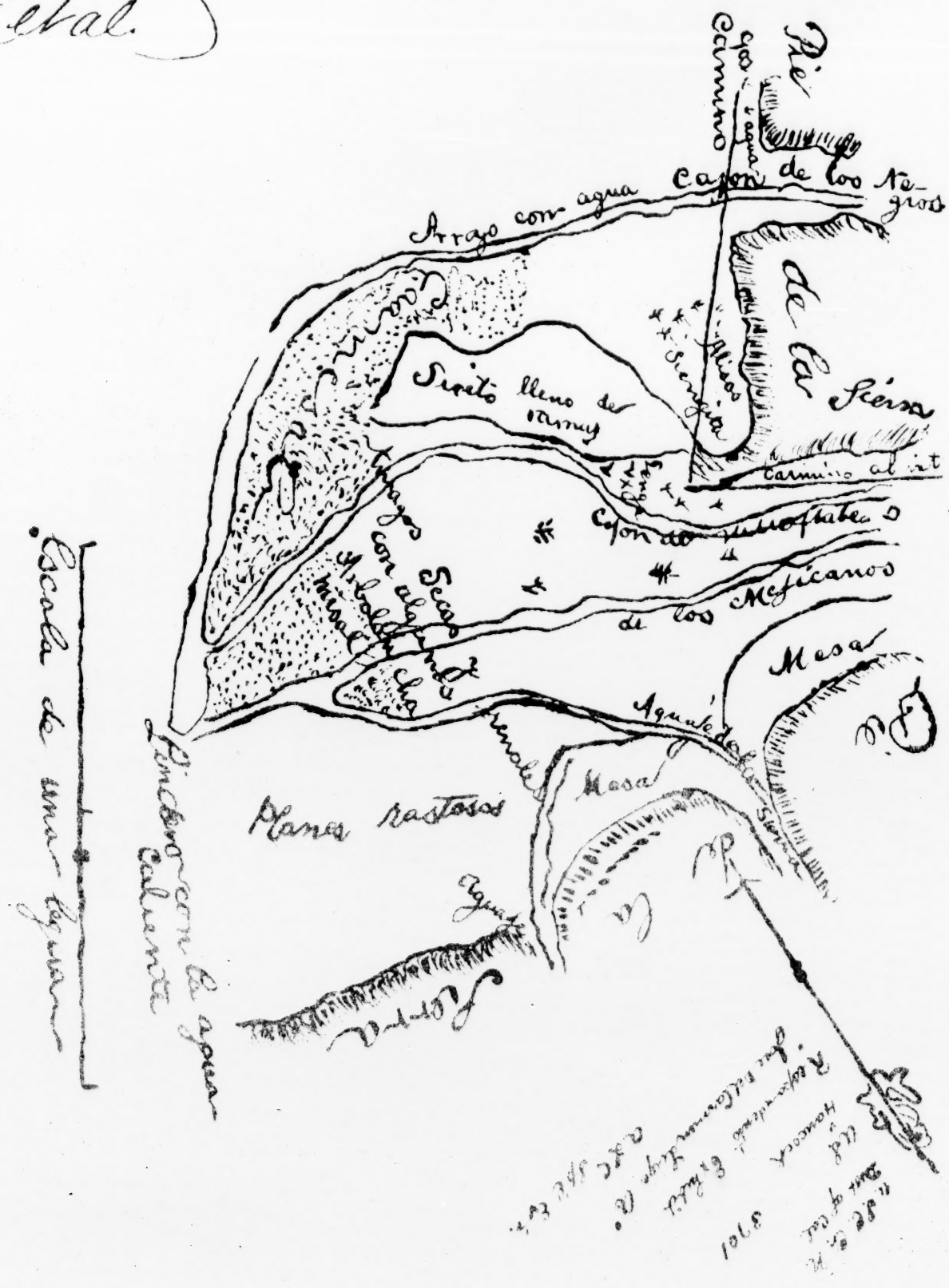
8/85 of plats

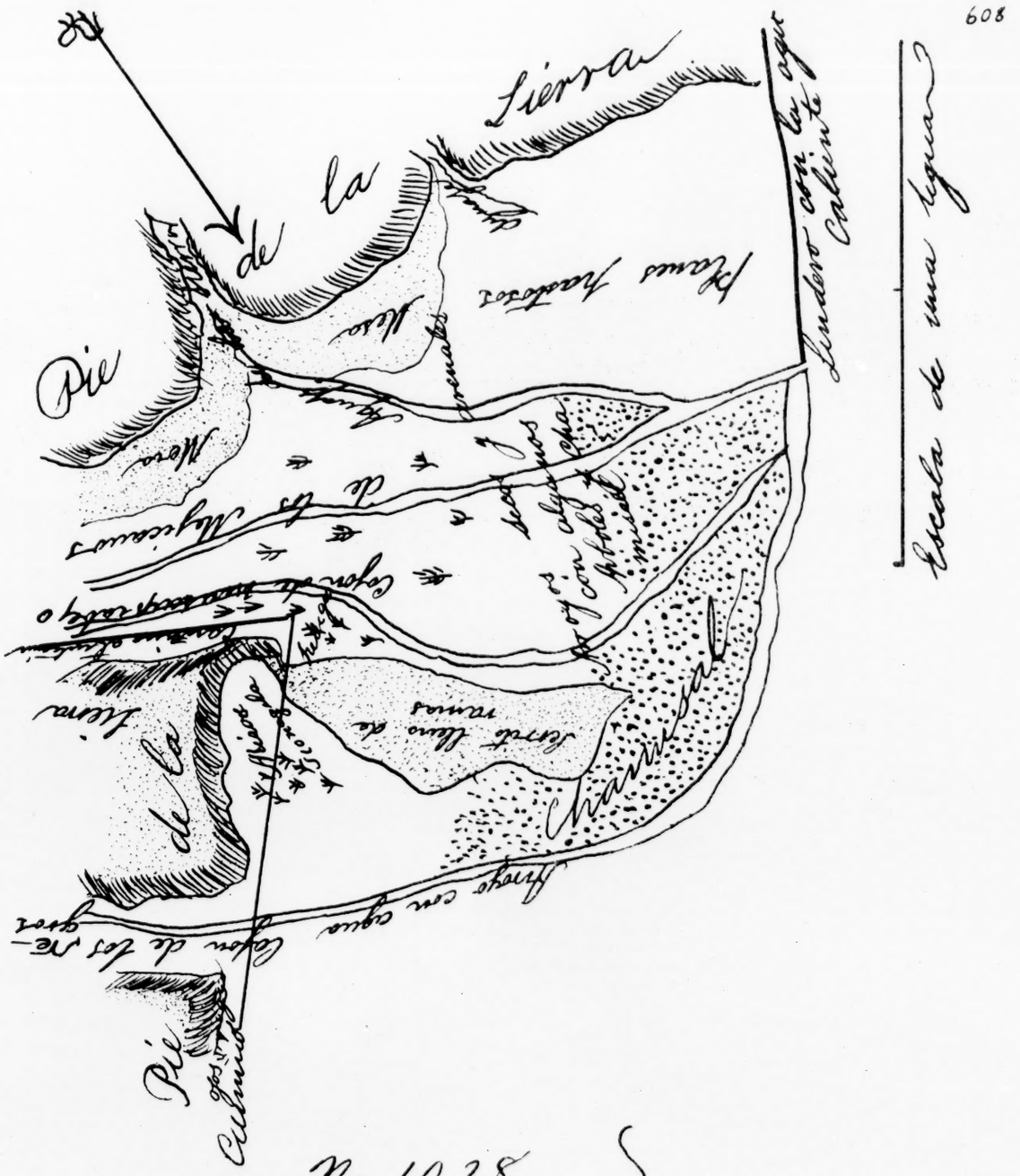


Notice the corner of N. W. 10. Dotted red line shows where the line runs between W/2 and E 2/3. of the qr section. In Porter Book map E/2 and Blocks 15 + 21 of Holmes Sub

No. 1028
The United States
vs.
Hancock et al.

p. 531





No. 1028.

The United States
v.
Hancock et al

} p. 608.

No 1028

The United States
v.
Hancock et al

p 643

PLAT

of the

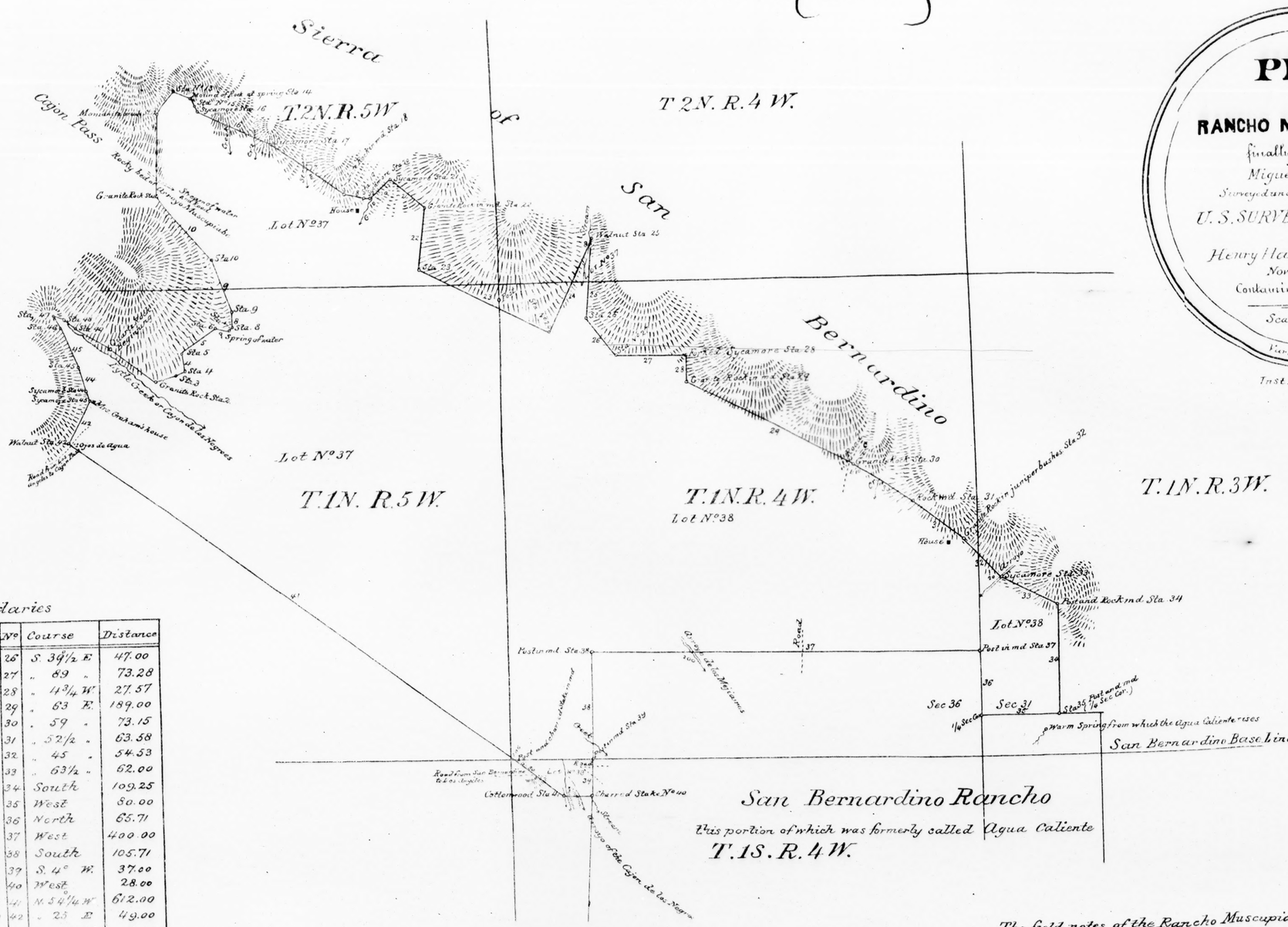
RANCHO MUSCUPIABE

finally confirmed to
Miguel White
Surveyed under instructions from the
U.S. SURVEYOR GENERAL
by
Henry Hancock, Dep. Sur.
November 1867
Containing 30144 $\frac{99}{100}$ Acres

Scale 80 Chs to Inch

Variation 14° 4' East

Inst. Oct. 14th. 1867.



Boundaries

No	Course	Distance	No	Course	Distance
1	S. 53° E.	53.00	26	S. 34½ E	47.00
2	N. 75 "	23.00	27	" 89 "	73.28
3	" 65 "	10.00	28	" 4¾ W	27.57
4	" 8 W	18.00	29	" 63 E.	189.00
5	" 54 E	44.00	30	" 59 "	73.15
6	S. 78½ "	14.00	31	" 52½ "	63.58
7	N. 39 "	4.00	32	" 45 "	54.53
8	" 1½ "	16.00	33	" 63½ "	62.00
9	" 21 W.	53.00	34	South	109.25
10	" 40 "	86.00	35	West	80.00
11	" 3 E	82.00	36	North	65.71
12	" 35 "	32.72	37	West	400.00
13	S. 61½ "	19.70	38	South	105.71
14	" 24 "	9.85	39	S. 4° W.	37.00
15	" 19 "	6.00	40	West	28.00
16	" 66 "	79.00	41	N. 54¼ W	612.00
17	" 54 "	90.00	42	" 23 E	49.00
18	" 77 "	21.00	43	" 19 W	11.00
19	" 81 "	4.90	44	" 20 "	25.00
20	N. 54 "	30.00	45	" 23 "	44.00
21	S. 51 "	43.00	46	" 38½ "	15.00
22	S. 8¼ W	62.00	47	S 70½ E	12.50
23	" 64 E	150.00	48	" 31½ "	15.00
24	N. 26½ "	103.71	49	" 63 "	40.00
25	S. 73¾ W	81.42			

I Hereby certify this to be a full true and correct copy of the original Plat on file in this office.

Witness my hand and Official Seal.

U.S. Surveyor Generals Office
San Francisco. California
April 8th 1886

R. D. Hammond, Jr
U.S. Surv Genl. Cal.

The field notes of the Rancho Muscupiabe from which this Plat has been made have been examined and approved and are on file in this Office.

U.S. Surveyor Generals Office
San Francisco. California
July 11th 1868.

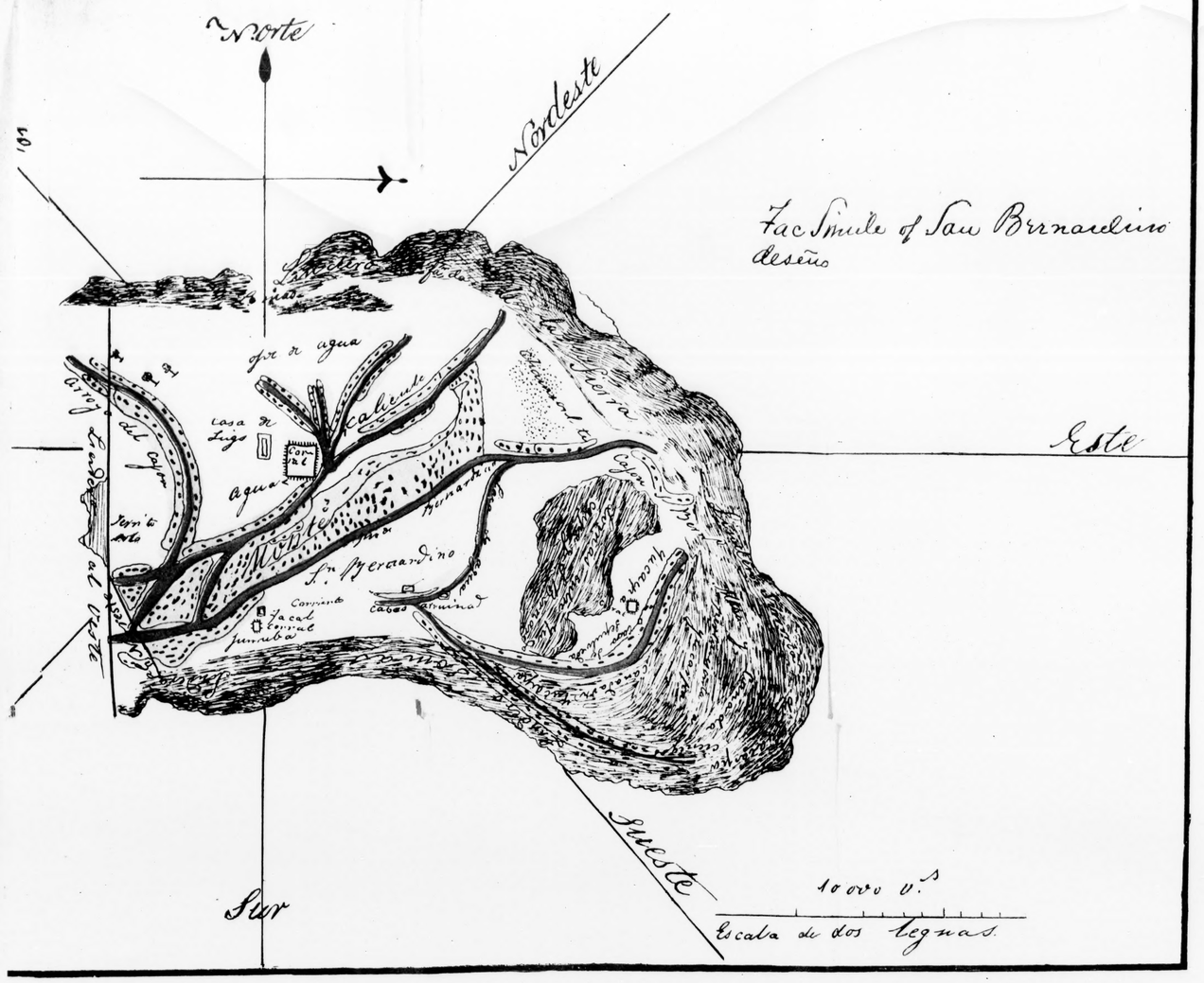
L. Upson
U.S. Surv Gen. Cal.

Approved June 21st 1872

Willis Drummond
Commissioner of the General Land Office

L.S.

Original

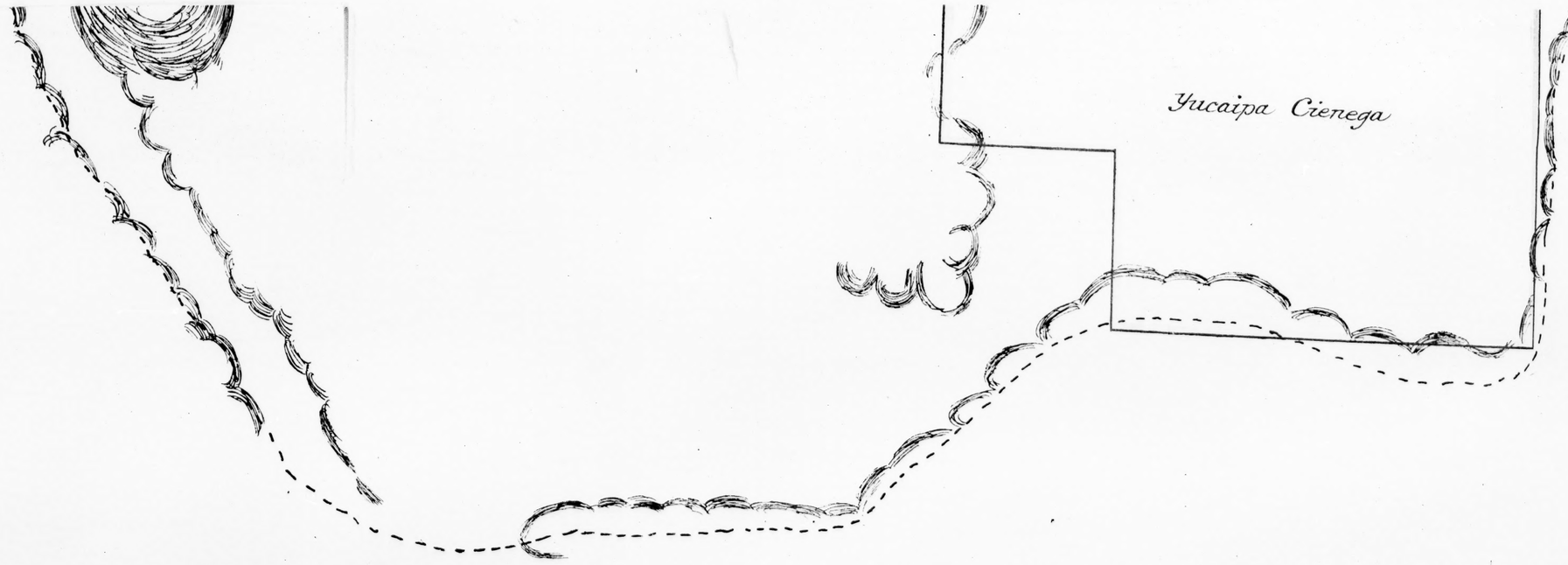

Norte
Nordeste
Este
Sueste
Sur
Fac Smile of San Brrnardino
deseño
Mission
S.n Bernardino
Casas arruinad
Corrientes
Jacal
Jacal Central
Jacal Jurisdiccional
Casa de Lugo
agua
Cañada de los Negros
Cañada de los Negros
Cañada de los Negros

Old Mission
of
San Bernardino

Bernardino

Mesa

Yucaipa Sierra


Yucaipa Cienega

Noroeste

Oeste

Sudoeste

Pie de

Cañon de Muscupiabe o de los Negros

Mesa

Agua de la Sed

Devil Canon

Pueblo Potrero

Caliente

Old Mormon or Mormon Wheat Field

Twin Cr.

Twin Cr.

Lomas

Arroyo la Agua Caliente

Town of San Bernardino

Approximate location of Lugos House

Cienegita

Ojos de Agua

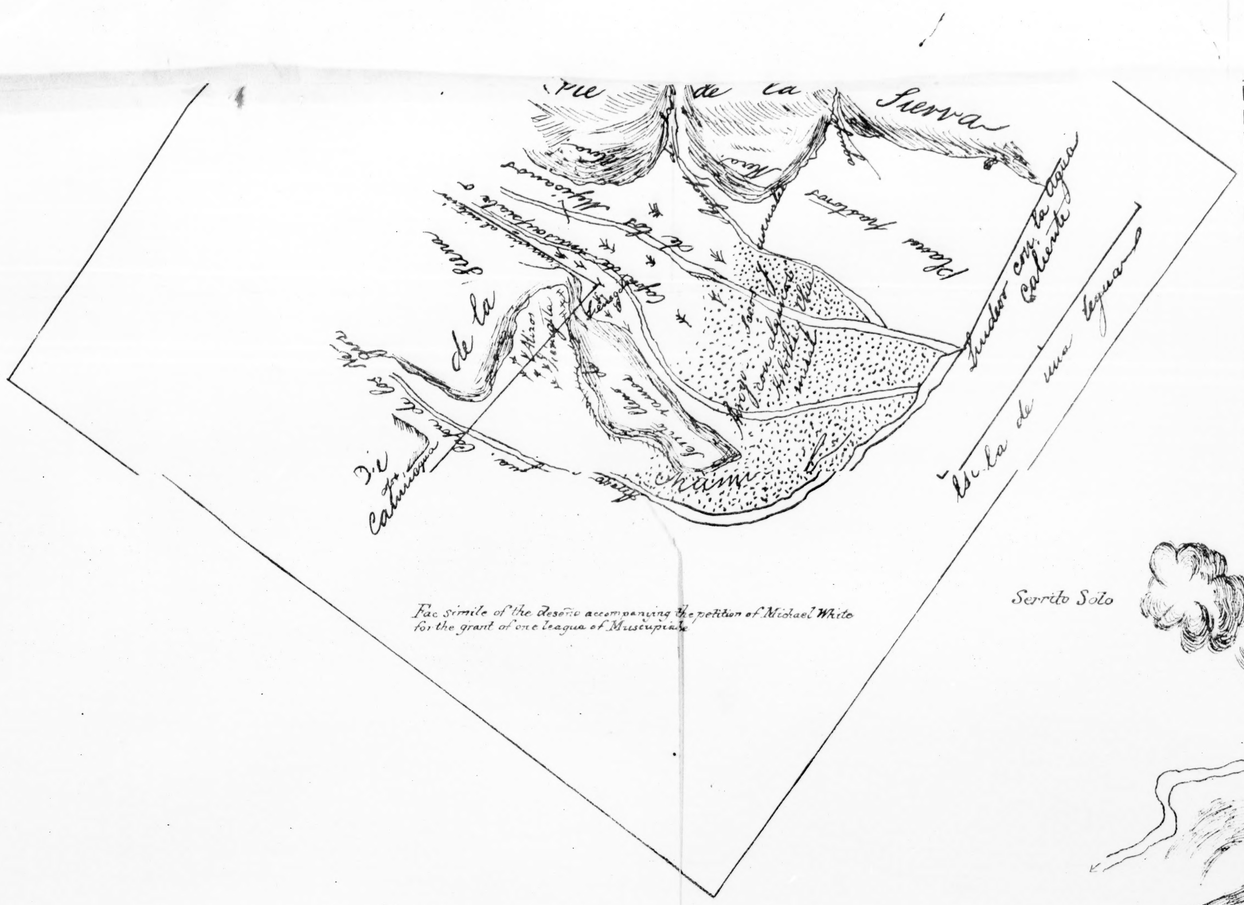
Cañon

Cañon de los Negros

Pie

de la Sierra

6



Fac Simile of the Desêño accompanying the petition of Michael White for the grant of one league of Mussupiuta

Endorsed;

U.S. Circuit Court Cal

U.S.
vs.
Hancock
No 3701

Complainants Exhib N

M.C.H. Ex &c.

Opened and re filed
Dec 21, 1886
L.S.B. Sawyer
Clerk.

Diseño del Paraje de Sn Bernardino

No 1028
The United States
v.
Haucock et al
p. 699

Norte

Nordeste

Noroeste

Oeste

Este

Sudoeste

Sudeste

Sur

Nota.

1a Las casas y Corrales no están sugetas ala Escala, y a fin estampado en un punto mayor pa hacerlas visibles.

2a El monte consiste en la gral en proziones Considerables de Sauces y Alamos, encontrandose algunos alisos y Sauces

10 000 Vs

Escala de dos leguas.

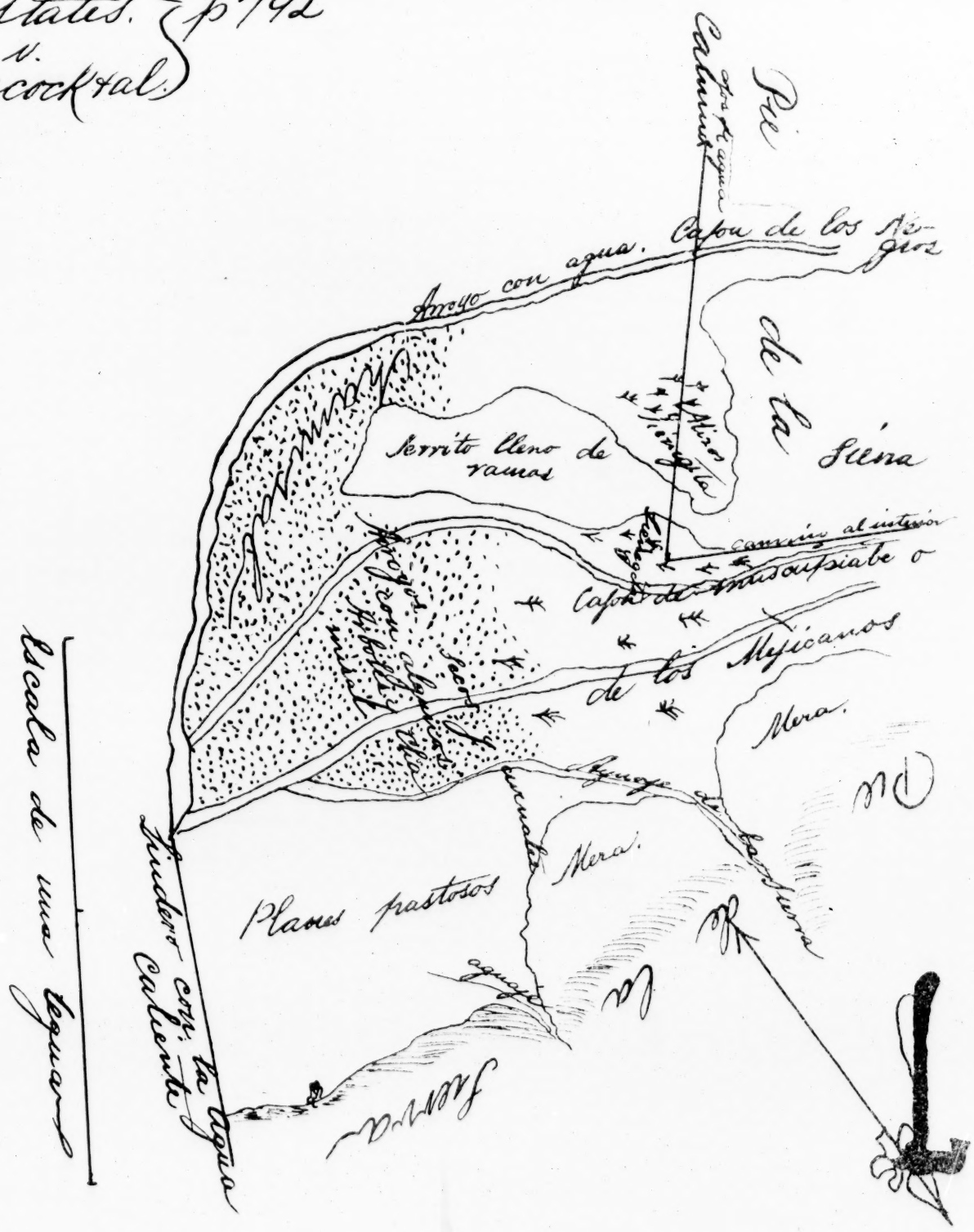
Map of the San Bernardino

U. S. Circuit Court, Dist of Cal.
U S
Hancock } No 3701
Respondents Exhibit H.
Examiner.

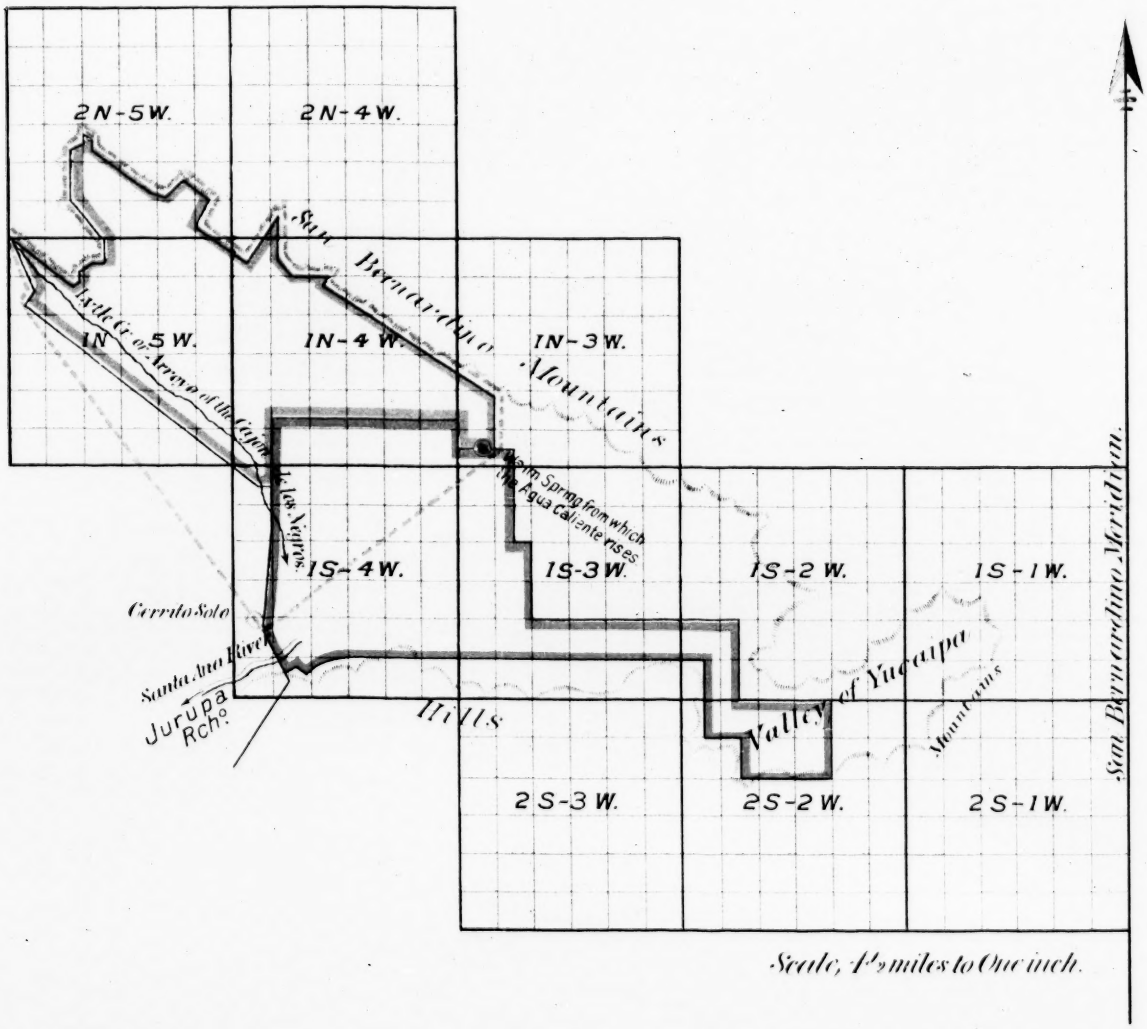
Opened and re-filed
Dec 21 1886
L J B Lange
clerk

792

No 1028
U. States.
v.
Hancock et al. } p 792



"Respondents' Exhibit 28"



Note. The lines colored red show the boundaries of the Rancho San Bernardino as patented.
" " " blue " " " " " " " Muscupiabe " "
" " " dotted green " " " " " " " Muscupiabe " described
in Deed of Michael White and wife to A. P. Crittenden, dated March 26th 1855.